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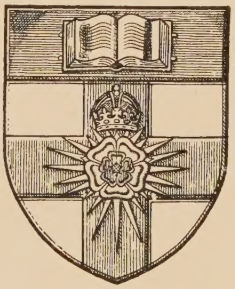

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284	— 11	*Rose-Innes*	*J. W. Brodie Innes.*
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

CECIL *v.* LANGDON.

C. A.
1884
Oct. 24.

[1874 C. 222.]

Power of appointing new Trustees—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 31, 33.

A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed "or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned" should die or be desirous of being discharged, &c., it should be lawful for "the surviving or continuing trustee or trustees for the time being," with the consent of the tenant for life or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, &c. In 1872, four new trustees were appointed under the *Trustee Act*, 1850, in the place of two deceased and two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, and another desiring to retire, the Plaintiff, who was an infant tenant in tail in possession, took out a summons to appoint new trustees, *W.* the continuing trustee took out a summons asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, *W.* proposed new trustees whom the Court considered to be proper persons, but to whom all the persons beneficially interested objected.

Held (affirming the decision of *Pearson*, J.), that the persons nominated by *W.* must be appointed, though the tenant in tail in possession did not consent, for that as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the Court in 1872, and that the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the

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continuing trustee by the *Conveyancing and Law of Property Act*, 1881, which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement.

BY an indenture of settlement dated the 6th of July, 1849, real estates were conveyed to the use of four trustees in fee upon trust, subject to provisions for raising certain charges, to pay the rents to *Samuel H. Cecil* for life, and after his death to *Rotherham Cecil* for life, and after his decease in trust for the sons of *Rotherham Cecil* successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainders in tail, and in default of such issue in trust for *Clarence F. Cecil* and his assigns for his life, with remainder in trust for his first and other sons successively in tail, with remainder in trust for his daughters as tenants in common in tail, with cross remainders between them in tail. The same settlement comprised personalty which was settled on similar trusts. The settlement gave to the trustees powers of leasing exercisable with the consent of the tenant for life in possession, and during the minority of any tenants in tail by purchase in possession at the discretion of the trustees. The settlement contained the following power of appointing new trustees:

"Provided always that if the trustees hereby appointed, or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned, shall die or be desirous of being discharged, &c., then and so often as the same shall happen, it shall be lawful for the surviving or continuing trustee or trustees for the time being, or if there shall be no such surviving or continuing trustee then for the retiring trustee or trustees for the time being, or the executors or administrators of the last surviving trustee for the time being, and they and he are and is hereby required, with the consent in writing of the tenant or tenants for life or in tail for the time being entitled in possession to the estates hereby settled, or to the receipt of the rents or profits thereof, by any deed, &c., from time to time to nominate and appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming incapable to act as aforesaid, so that the number of four trustees may as nearly as may be continually kept up." There followed the usua

direction for conveyance of the estates so as to vest them in the trustees for the time being.

Two of the trustees having died, new trustees were appointed by the Court in a suit on the 20th of December, 1853.

On the 26th of April, 1872, the two other original trustees having died, and the two trustees appointed in 1853 desiring to be discharged, an order was made under the *Trustee Act*, 1850, appointing four new trustees and directing the trust property to be conveyed to them.

The present suit was instituted in 1874 for carrying into execution the trusts of the settlement, and a decree was made in 1875.

One of the trustees died some years before 1884, another in January, 1884, and another, *Penley*, desired to be discharged. It was therefore proposed to appoint new trustees. The Plaintiff was tenant in tail in possession and was an infant.

On the 2nd of February, 1884, the Plaintiff by his next friend took out a summons asking that four specified persons might be appointed trustees in the place of the two deceased trustees, the retiring trustee, and *Ward*, the fourth trustee, against whom a case of misconduct was alleged. On the 9th of February a summons was taken out on behalf of *Ward* and *Penley*, asking that they might be at liberty to appoint three specified persons to be trustees in the place of the two deceased trustees and *Penley*. This summons was amended by making it on behalf of *Ward* only.

The summonses came on before Mr. Justice *Pearson*, and the case against *Ward* was withdrawn. Mr. Justice *Pearson* did not approve of the persons nominated by *Ward*, and on the 17th of June an order was made referring it to chambers to appoint new trustees in the place of the two deceased trustees and the retiring trustee "without prejudice to the right of the said *J. H. Ward* to nominate such new trustees."

This order was carried into chambers, and *Ward* nominated gentlemen who were objected to by the family, but as there was no doubt that they were fit and proper persons, the Judge held that they must be appointed. The Plaintiff then appealed from the order of the 17th of June, and the appeal was heard on the 24th of October, 1884.

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Northmore Lawrence, for the Appellant :—

The power in the settlement authorizes the surviving or continuing trustee to appoint with the consent of the tenant for life or tenant in tail in possession. If the power is exercisable it must be with the consent of the infant. The *Conveyancing Act*, 1881, sect. 31, is relied upon, but attention must be paid to sub-sect. 7, which makes the operation of the Act subject to any indication of a "contrary intention" in the settlement. Here the intention is plain that no trustee shall be appointed without the consent of the person entitled in possession, and effect must be given to that intention. *In re Gadd* (1) was referred to below, but really does not bear on the present question, it only decided that a decree for execution of the trusts does not take away a power of appointing new trustees given by the settlement. What I contend is that where the settlement imposes a fetter, the statute does not give a power without a fetter.

Cozens-Hardy, Q.C., and *Samuel Dickinson*, for *Ward* :—

We say that there is in the settlement no power of appointing new trustees which can now be exercised, so the case stands on the same footing as if there were not in the settlement any power of appointing new trustees. The power only provides for the appointment of trustees in the place of the original trustees, or trustees appointed under the power. Now in 1872 four new trustees were appointed by the Court, and not under the power, the power therefore does not authorize the filling up vacancies in their number. When that appointment by the Court was made, the power came to an end. It is true that under Lord *Cranworth's Act*, 23 & 24 Vict. c. 145, s. 27, and the *Conveyancing and Law of Property Act*, 1881, s. 33, a trustee appointed by the Court can exercise powers in the same way as if he had been appointed by the settlement; but this does not enable him to go beyond the power. After the appointment of 1872, a tenant for life with a power of appointing new trustees could not have filled up vacancies, because they are vacancies in a body to which the power does not apply. There being then no power of appointment under the settlement which can be exercised, sect. 31 comes in and

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enables the continuing trustee to appoint. A fetter imposed by the settlement on a power of filling up vacancies in a particular body of trustees cannot be imported into the statutory power of filling up vacancies in another body. The settlors had no intention one way or other about filling up vacancies in the latter body, and there cannot be a "contrary intention" within the meaning of the Act.

C. James, for *Penley*.

Northmore Lawrence, in reply:—

The 33rd section gives the trustees appointed by the Court the same powers as the original trustees had; but those powers are not to be extended.

BAGGALLAY, L.J.:—

The circumstances of this case are singular, and if the view we are taking should be considered a narrow one, we have the satisfaction of thinking that such a case will seldom occur again. Four gentlemen were originally appointed trustees, two of them died, and the Court of Chancery appointed two new trustees to act jointly with the survivors. The survivors having died and the new trustees wishing to retire, four trustees were appointed in their room by the Court. So when the suit was instituted all four trustees were trustees appointed by the Court. The settlement contains a power of appointing new trustees; but only in the event of the death, &c., of any of the original trustees, or of trustees appointed as thereinafter provided, that is, appointed under the power. I think the argument of Mr. *Cozens-Hardy* must prevail, that the power in the settlement is inapplicable, since the trustees in whose place new trustees are to be appointed are neither original trustees nor trustees appointed under the power.

The 31st section of the *Conveyancing and Law of Property Act*, 1881, meets the case, since it provides for all cases where there is no power in the instrument under which new trustees can be appointed, and it applies whether the trustees whose places have become vacant have been appointed under a power, or by the Court, or otherwise. Under this clause the continuing trustee

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has the power of appointing new trustees without the consent of anyone. Mr. *Northmore Lawrence* argues that sub-sect. 7 applies, for that a contrary intention is expressed. But where is it expressed? A necessity for consent is expressed, but only with regard to particular cases, namely cases where the trustees whose places are to be filled up were original trustees, or trustees appointed under the power. It seems to me that the fetter imposed on appointments under the power cannot apply to appointments not made under the power. It is suggested that sect. 33 of the Act has a bearing on the case. If the case were one to which the power of appointing new trustees given by the settlement applied, and the trustee by virtue of the Act were exercising that power, he could only exercise the power subject to the fetter imposed upon it. But in the case before us he is not acting under the power in the settlement. The appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. I do not know whether our construction is to be considered narrow or not, but it appears to me that sect. 31 authorizes the continuing trustee to appoint new trustees without any consent unless a contrary intention is expressed by the instrument. Now we have to deal with a case to which the power in the settlement does not apply, and therefore with a state of circumstances as to which no intention is expressed one way or the other.

FRY, L.J.:—

I am of the same opinion. By the settlement a fetter is imposed on the exercise of the power of appointing new trustees therein contained. I do not think that this can be construed as an expression of intention that the same fetter should be imposed on an appointment not made under that power, but under a state of circumstances to which the power does not refer. It appears to me therefore that sub-sect. 7 does not affect the case.

Solicitor for Appellant: *C. J. Mander.*

Solicitors for the Respondent: *Tamplin, Tayler, & Joseph.*

H. C. J.

SMITH *v.* LAND AND HOUSE PROPERTY CORPORATION.

C. A. 1884 Oct. 27.

[1882 S. 4469.]

Vendor and Purchaser—Misrepresentation.

The Plaintiffs put up an hotel for sale on the 4th of August, 1882, stating in the particulars that it was let to "*F.* (a most desirable tenant), at a rental of £400 for an unexpired term of 27½ years." The *L. Co.* sent *M.*, their secretary, to inspect the property. *M.* reported that *F.*, from the business he was doing could hardly pay the rent, and that the town in which it was situate seemed to be in the last stage of decay. The directors on receiving this report, directed *M.* to bid up to £5000. *M.* went and bought for £4700. Before completion, *F.* went into liquidation, and the *L. Co.* refused to complete. The Plaintiffs sued for specific performance. It was proved that on the 1st of May, 1882, the Lady Day quarter's rent was wholly unpaid; that a distress was then threatened, and that *F.* paid £30 on the 6th of May, £40 on the 13th of June, and the remaining £30 shortly before the auction, and that no part of the quarter's rent due at Midsummer had been paid. The chairman of the company was orally examined, and deposed most positively, that the company would not have bought but for the representation in the particulars that *F.* was a most desirable tenant. Mr. Justice *Denman* held that there was a material misrepresentation, and that the contract had been entered into in reliance upon it. His Lordship accordingly dismissed the action, and on a counter-claim by the Defendants, rescinded the contract.

Held, on appeal, that the description of *F.*, as a most desirable tenant, was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the Lady Day rent shewed that he was not a desirable tenant; and that there was a misrepresentation:

Held also, that, as the positive testimony of the chairman, that but for this representation the company would not have bought, was not shaken on cross-examination, and was believed by the Judge who saw and heard the witness, the Court of Appeal would not disturb the finding that the representation had induced the company to enter into the contract, and that the appeal must be dismissed.

THE Plaintiffs as mortgagees with a power of sale, advertised for sale by auction on the 4th of August, 1882, at the *Auction Mart, London*, a freehold hotel, at *Walton-on-the-Naze*, which in the title-page of the particulars, was described as "now held by a very desirable tenant, Mr. *Frederick Fleck*, for an unexpired term

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of twenty-eight years, at a rent of £400 per annum." In the body of the particulars, it was stated that "the whole property is let to Mr. *Frederick Fleck* (a most desirable tenant), at a rental of £400 per annum (clear of rates, taxes, insurance, &c.), for an unexpired term of 27½ years, thus offering a first-class investment."

The directors of the *Land and House Property Corporation* having become aware that the property was being offered for sale, sent down their secretary to visit it, and report to the next committee.

The secretary, Mr. *M'Lewin*, reported as follows: "On Saturday, I visited *Walton-on-the-Naze*, with the view of inspecting the *Marine Hotel*. The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving hotel. Mr. *Fleck*, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. *Fleck*, with his eyes open, could have been induced to take the hotel at the present rental. The only thing that I see that can be done with the hotel to make it pay as an investment, would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a kind of casino. The town itself seems to be in the very last stage of decay from beginning to end. The old pier, wrecked on the 18th of January, 1881, has never been replaced. The landslip which occurred on the above occasion, has never been made good."

This report was read at a meeting of the committee on the 1st of August, 1882, at which Alderman *Knight*, afterwards Lord Mayor of *London*, was in the chair. The committee passed a resolution instructing the secretary to bid up to £5000. The secretary attended at the auction, but did not bid, and the property was bought in, the reserved bidding not having been reached. The secretary immediately afterwards made a proposal to purchase by private contract, and an agreement was signed on the same day for purchase, at £4700.

Fleck, in September, went into liquidation. The purchasers thereupon, refused to complete, and in October the vendors brought this action for specific performance. The Defendants, by their statement of defence alleged (*inter alia*) that *Fleck* was not

a desirable tenant as stated in the particulars, but was quite unable to pay the rent of £400 a year. That such rent was in arrear at the time of the sale. That *Fleck* was insolvent, and shortly afterwards filed his petition for liquidation. The Defendants by counter-claim, claimed a return of the deposit; expenses of investigating the title, and cancellation of the contract, or, in the alternative, compensation for misdescription.

The misrepresentation on which the case turned was as to *Fleck's* character as a tenant. As to this the evidence was as follows: *Fleck* had been tenant from 1880, and there was no evidence as to the payment of his rent prior to January, 1882, when the Plaintiffs gave him notice to pay rent to them. A quarter's rent became due at Lady Day, and it not having been paid, the Plaintiffs on the 1st of May, threatened a distress. *Fleck* then wrote to ask for time. The Plaintiffs replied that the rent could not be allowed to remain over Whitsuntide; and on the 6th of May, *Fleck* paid £30 on account. On the 13th of June he paid £40 more on account, and the balance of £30 was paid some time before August, but on what day did not appear. At the time when the sale took place, the Midsummer rent had been applied for, but no part of it had been paid. *Fleck's* references when he had been accepted as tenant, were shewn to have been very good, and it was deposed to that he was an able manager of an hotel. The description of *Fleck* as a desirable tenant, was inserted by the auctioneer who had been at the place and seen *Fleck*. He said that he considered him a very proper person to be landlord of such an hotel, that he seemed to be in a flourishing condition, and that there were no signs of insolvency about him or his hotel. The auctioneer had prepared the particulars and inserted this description without any instructions on the subject.

As regards the question whether the contract had been entered into in reliance on the statement as to *Fleck's* being a most desirable tenant, Alderman *Knight* was orally examined before Mr. Justice *Denman*, who tried the action. He deposed, that at the meeting when the secretary was directed to bid, the directors had no information about *Fleck's* position, except what was given in the particulars of sale, which were before them and were particularly referred to, especially on the point of the "desirable

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cretion on the 4th of August? He had made his report, and was instructed to bid up to £5000.

BOWEN, L.J.:—Is it not a question of fact in each case whether the representation was relied on?

FRY, L.J., referred to *Redgrave* v. *Hurd* (1).]

In that case there was a misrepresentation as to the amount of the profits of the business, a definite mis-statement of a fact within the vendor's own knowledge; here we have nothing but a vague laudatory flourish, which, according to the opinion of Sir *W. Grant* in *Trower* v. *Newcome* (2), goes for nothing. The report here shews that the secretary made inquiries as to *Fleck's* circumstances, and whatever knowledge he had must be attributed to the directors.

Davey, Q.C., and *W. A. Raikes, contrà*, were not called upon.

BAGGALLAY, L.J.:—

On the 4th of May, 1882, the Plaintiffs entered into a contract with the Defendants for the sale to them of certain property described in particulars of sale. The property had been offered for sale by auction, but no sale was effected, and immediately afterwards this contract was entered into. The purchasers declined to complete, saying that they had been induced by misrepresentation to enter into the contract. Early in October, 1882, this action was commenced by the vendors for specific performance. It was met by a statement of defence, accompanied by a counter-claim for rescission of the contract or compensation. The foundation of the counter-claim is that the property was first described in the particulars as held by *Fleck*, "a very desirable tenant," and then again as "let to Mr. *F. Fleck* (a most desirable tenant, at a rental of £400 per annum, for an unexpired term of twenty-seven and a half years, thus offering a first-class investment." It is alleged that this was a false representation, for that it was not true that *Fleck* was a "very desirable" or a "most desirable" tenant. The vendors entered into receipt of the rents in January, 1882. We have no evidence as to the receipt of rent which accrued before Lady Day, 1882, but as to the quarter's

(1) 20 Ch. D. 1. (2) 3 Mer. 704.

rent which accrued on that day it is in evidence that it was not paid at once; that a distress was threatened, but not put in, and that the tenant paid £30 on the 6th of May, £40 on the 13th of June, and the balance of £30 some time before August, but at what precise time it does not appear. At the date of the auction, on the 4th of August, the Midsummer rent had been applied for, but no part of it had been paid. Under this state of things the representation in question was made. It is said that these are words of course put in by the auctioneer, but I hold it to be the duty of a vendor to see that the property is not untruly described, and I cannot hold him to be excused because a description which the property will not bear has been inserted by the auctioneer without his instructions. Nor can the auctioneer excuse himself for inserting a false representation by saying that he did not know it to be untrue. I think that Mr. Justice *Denman* came to a correct conclusion as to there having been a material misrepresentation, for the vendors must have known perfectly well that the tenant did not pay his rent properly, and they therefore were not justified in describing him as a very desirable tenant.

We have then to consider whether the representation materially influenced the Defendants in coming to a conclusion to bid for the property. The evidence on this head is all one way. [His Lordship read the passages from the evidence of Alderman *Knight* which are given above.] This evidence is uncontradicted. It is true that in a case of this kind it would be very difficult to find any person who could contradict the evidence, and reliance was placed on the secretary's report. [His Lordship read the report.] I think that the expressions in this report as to *Fleck* from the amount of business he was doing being hardly able to pay the rent, only meant to say that, according to the amount of business at present going on, it was difficult to see how *Fleck* could pay his rent and taxes out of the profits, and that these expressions do not at all tend to shew that he was not a desirable tenant, for he might have means which would enable him to go on paying the rent till the business improved. Then Alderman *Knight* states most positively that having regard to the surroundings he should not have purchased but for the representation that *Fleck* was a very desirable tenant. It must then in my opinion be

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considered that the representation was relied on. Now a man who paid his rent so irregularly could not properly be represented as a desirable tenant. After the report had been considered by the directors, the secretary was authorized to attend at the auction and bid up to £5000. The secretary no doubt saw that the biddings were going in such a way that he should have a chance of getting a better bargain by private contract. He did not bid, but immediately after the auction, the property not having been sold, he agreed to purchase for £4700. Some observations were made on a conversation alleged to have taken place between the secretary and the auctioneer, tending to shew that the former knew something to *Fleck's* disadvantage. But the secretary on this occasion was an agent for a particular purpose, being directed to buy the property if he could get it for a sum not exceeding £5000, it was no part of his business to regulate his bidding by what he learnt about the tenant. What he may have heard or said on that occasion, when he was only sent as an agent for the purpose of buying on the best terms he could get not exceeding £5000, cannot be evidence against the directors.

I need not say much as to the cases. In *Scott* v. *Hanson* (1) and *Trower* v. *Newcome* (2), the question was whether there was any misrepresentation or not. In *Trower* v. *Newcome* a living was described as likely to become vacant soon, and a statement was made orally that it would become vacant on the death of a person aged eighty-two. This did not amount to a representation that the incumbent's age was eighty-two. *Redgrave* v. *Hurd* (3) is in favour of the purchasers. On the facts as found in the present case I think that Mr. Justice *Denman* came to a right conclusion.

BOWEN, L.J.:—

I am of the same opinion. The action is by vendors for specific performance, and the purchasers allege that there is in the particulars a misrepresentation which disentitles the Plaintiffs to specific performance. To sustain this defence the Defendants must prove that there was a material misrepresentation, and that they entered into the contract on the faith of the representation.

(1) 1 Sim. 13; 1 Russ. & My. 128. (2) 3 Mer. 704.
(3) 20 Ch. D. 1.

Was there then a misrepresentation of a specific fact? This partly depends on the question, whether on the construction of the particulars, what they say as to *Fleck* is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the Judge in the Court below. Whether the purchasers relied upon it is a question of fact which the Judge of the Court below had better means of deciding than we have, for he saw and heard the witnesses.

In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant, other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *primâ facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between

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Lady Day and Midsummer, I think that it was not. On the 25th of March, a quarter's rent became due. On the 1st of May, it was wholly unpaid and a distress was threatened. The tenant wrote to ask for time. The Plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now could it at the time of the auction, be said that nothing had occurred to make *Fleck* an undesirable tenant? In my opinion a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant.

Treating this then as a misrepresentation, did it induce the purchasers to buy? 'It appears to me that it is in every case a question of fact whether a person is induced to buy by a particular representation.' We may obtain valuable hints from reported cases, but none of the cases appear to me to impugn the proposition that the question is one of fact to be decided on the circumstances of each particular case. A representation in the particulars must be taken as made for the purpose of influencing the purchaser's mind. Then did the purchaser rely upon it? I cannot quite agree with the remark of the late Master of the Rolls in *Redgrave* v. *Hurd* (1), that if a material representation calculated to induce a person to enter into a contract is made to him it is an inference of law that he was induced by the representations to enter into it, and I think that probably his Lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference as an inference of fact. But here we are not left to inference. The chairman of the company was called and swore in the most distinct and positive way that it did influence him, and that but for the representation he would not have purchased. The Judge was at liberty to disbelieve him, but I see no reason why he was bound so to do. His evidence was not shaken on cross-examination, and the Judge believed him. He uses the very argument that the property had been examined on behalf of the company as strengthening the statement that the company relied on the representation, for he says the report of the secretary was so unfavourable that but for the representation as to the tenant they would not have bought.

(1) 20 Ch. D. 1, 21.

Redgrave v. *Hurd* (1) shews that a person who has made a misrepresentation cannot escape by saying, "You had means of information, and if you had been careful you would not have been misled." It was urged that Alderman *Knight* would not have relied on the representation had he not put on it a construction that it will not bear, viz., that it was a guarantee that the tenant would go on paying the rent. I do not think that he understood it so. I think he merely understood it as a representation that, so far as the vendors knew, the tenant was likely to go on paying the rent for the rest of the term. If we had merely to deal with the evidence of Alderman *Knight* on paper, I should not feel quite satisfied that we ought to treat it as satisfactory, but as the Judge who heard and saw him was satisfied, I think that we ought not to differ from his conclusion.

FRY, L.J.:—

After the full discussion of this case by my learned Brothers I have little to add. The first question is whether the stating *Fleck* to be a very desirable tenant was a misrepresentation. It seems to me that the vendors by describing him as such stated in substance that they knew no fact which shewed him not to be a desirable tenant. The Judge in the Court below has found that they did know facts which shewed him not to be a desirable tenant, and I see no reason to dissent from that conclusion.

The second question is whether the purchasers purchased on the faith of that representation. The learned Judge has found that they did. On that question I feel the same difficulty as Lord Justice *Bowen*, and on the evidence as read before us I should have felt inclined to come to the conclusion that the contract was not induced by that representation; but as Mr. Justice *Denman*, who saw and heard Alderman *Knight*, was satisfied with his evidence, I cannot give my voice for reversing his decision.

Solicitors for Plaintiffs: *R. S. Taylor, Son, & Humbert.*
Solicitors for Defendants: *Smythe & Brettell.*

(1) 20 Ch. D. 1.

H. C. J.

C. A.
1884
PEARSON, J.
Aug. 11.
C. A.
Oct. 29.

BRADFORD *v.* YOUNG.
In re FALCONAR'S TRUSTS.

[1883 B. 1099.]

Practice—Stay of Proceedings pending Appeal—Payment out of Fund in Court —Rules of Supreme Court, 1883, *Order* LVIII., *r.* 16.

In the absence of special circumstances it is not the practice of the Court to retain in Court pending an appeal a fund which has been ordered to be paid out, because there is an appeal from the order.

An order directing the payment of a fund out of Court to the Plaintiff having been made just before the commencement of the Long Vacation, and an appeal having been presented, a suspension of the payment out was granted over the Long Vacation, in order to enable the Appellant to apply to the Court of Appeal.

Wilson v. *Church* (1) and *Walburn* v. *Ingilby* (2) considered.

On appeal, it being shewn that the Plaintiff had been abroad for two years, and that the applicant could not discover his address, it was held that payment out ought to be stayed if the applicant would give security to pay to the Plaintiff interest at £4 per cent. on the present value of the funds in Court, and to make good to the Plaintiff, if the appeal was unsuccessful, the difference between the highest market price of the investments at any time before the hearing of the appeal and their market price on the day of the hearing of the appeal.

THIS was a motion for a stay of proceedings pending an appeal.

On the 29th of April, 1884, Mr. Justice *Pearson* (3) made an order declaring that the domicil of *Hugh Falconar*, the testator in the writ named, was at the date of his death, on the 23rd of January, 1827, in *Scotland*, and ordering that a case be settled for the opinion of the Court of Session in *Scotland* as to the interest taken by his daughter *Jane Falconar*, or those respectively entitled after her death, under an unsigned document prepared in the Scotch form in 1826 and admitted to probate in *England* on the 29th of March, 1828. A case was afterwards settled by the Judge, and on the 19th of July, 1884, the Court of Session, having heard counsel for the parties, answered the questions stated in the case as follows: (1.) "We are of opinion that the words of residuary bequest referred to, occurring in an unsigned

(1) 12 Ch. D. 454. (2) 1 My. & K. 79.
(3) 26 Ch. D. 656.

writing, are by the law of *Scotland* inoperative to affect the estate or succession of a domiciled Scotchman, and are simply worthless and of no effect whatever. It follows that *Jane Falconar* took by them no interest in the succession of her father, who died a domiciled Scotchman, and that her legal personal representative can take none. It is, in our opinion, immaterial to the question on the law of *Scotland* that the unsigned writing was admitted to probate in *England*, and that it is a good testamentary disposition according to English law. It is nevertheless a nullity by the law of *Scotland*, and no Court administering the law of *Scotland*, or acting according to that law as governing the case before it, can give effect to it. (2.) For the same reason we are of opinion that the children and remoter descendants of *John Falconar* can take nothing by the bequest referred to.

"We have to add that, had the writing been signed so as to give validity to its contents, we should in that case have been of opinion, taking it as a Scotch instrument, that *Jane Falconar* on surviving the testator took an absolute interest in the property as residuary legatee, subject only to the constitution of a trust in circumstances that did not occur, and that on her death without issue, as stated in the case, the property passed to her legal representative, the descendants of *John Falconar* taking nothing."

On the receipt of this opinion Mr. Justice *Pearson* directed the action and petition to be placed in the paper to be heard on further consideration, and, on the hearing on further consideration on the 8th of August, 1884, his Lordship directed that, subject to the payment of the costs of all parties (including the costs of the proceedings in the Scotch Court) as between solicitor and client, the fund in Court should be transferred to the Plaintiff, as sole executor of *Jane Falconar*, on the ground that *Jane Falconar* was entitled thereto under the testator's Scotch will of 1819 and the holograph codicil of 1823.

On the 13th of June, 1884, *H. Thornton*, one of the Defendants, gave notice of appeal from the order of the 29th of April, and on the 8th of August he gave a notice of motion asking that, pending the appeal from the order of the 29th of April, the payment out of the fund in Court directed by the order of the 8th of August might be suspended.

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James Kaye, for the motion:—

The fund ought not to be paid out of Court pending the appeal. In *Brewer* v. *Yorke* (1), on an application being made to suspend the payment out of a fund in Court, pending an appeal to the House of Lords, *Jessel*, M.R., said: "It is of course to stay the payment out of the moneys," and Lords Justices *Cotton* and *Lindley* concurred in the decision.

Cozens-Hardy, Q.C., and *A. Young*, for the Plaintiff:—

There is not even a suggestion that the Plaintiff is not perfectly solvent, or that the money will not be quite safe if it is paid out to him. It is not the practice of the Court to stay the payment of a fund out of Court as a matter of course, merely because there is an appeal from the order directing the payment out. If this were the practice, rule 16 of Order LVIII. would have provided that "an appeal *shall* operate as a stay of execution or of proceedings under the decision appealed from," instead of that it shall not so operate except so far as the Court may order. Some special circumstance must be shewn, such as that the fund would be in danger if it was paid out.

James Kaye, in reply:—

No doubt the Court has a discretion. But here the fund is very large (over £10,000), and the payment out would be made to a sole executor. The questions of law which arise are difficult, and there must necessarily in every case be some risk that, if money is paid out of Court, it will not be forthcoming in case the decision should be reversed.

PEARSON, J.:—

I have looked at the authorities on the point, and particularly at what was said by the Lords Justices in *Wilson* v. *Church* (2), where an application was made to stay the distribution of a fund in the hands of trustees, pending an appeal to the House of Lords. Lords Justices *Cotton* and *Brett* were of opinion that the application ought to be granted, but Lord Justice *James* dissented. As I am not acquainted with all the facts of that case, I do not know

(1) 20 Ch. D. 669. (2) 12 Ch. D. 454.

exactly what the grounds of his dissent were. But, looking at what was said by Lord *Brougham* in *Walburn* v. *Ingilby* (1), it appears to be by no means the settled rule of the Court that, without any special ground being shewn, a fund which has been ordered to be paid out should be retained in Court simply because there is an appeal from the order. Such a rule would, as Lord *Eldon* pointed out in *Huguenin* v. *Baseley* (2), "palsy the arm of justice." Having regard to the time of year, I think the proper course in the present case will be to suspend the payment out of Court until the 3rd of November next, but not longer. This will give the Defendant an opportunity of applying to the Court of Appeal without embarrassing that Court, in which there is now a great pressure of business. The taxation of costs will not be suspended.

W. L. C.

The funds in Court were £1201 18*s.* 4*d.*, money on deposit, and £8911 5*s.* *East India* £4 per cent. stock, out of which funds the costs of the action and the petition were to be paid.

On the 29th of October *Thornton* renewed the application before the Court of Appeal (*Baggallay*, *Lindley*, and *Fry*, LJJ.). A clerk of his solicitors made, on the 27th, an affidavit, which, after setting out communications that had taken place as to retaining the funds in Court, went on to state to the following effect:—

"Although I have made every inquiry in my power, I have wholly failed to ascertain anything with regard to the Plaintiff's residence or pecuniary position, except that I have ascertained that he is no longer residing at the address given in the affidavit filed by himself and the Defendant, *W. B. Young*, in the above-mentioned matter on the 29th of August, 1882, on their paying the said funds into Court; and on inquiry on the 25th of October, 1884, at the Plaintiff's residence mentioned in the writ in this action, I was informed that the Plaintiff had been abroad for nearly two years last past, and when last heard of was at *Homburg* in *Germany*. On the same date I inquired at the *Junior United Service Club* in *Charles Street, St. James'*, in the county of

(1) 1 My. & K. 79. (2) 15 Ves. 180.

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Middlesex, to which I was informed the Plaintiff belonged, for his address, but was told by the hall porter he did not know his address. I do not find the Plaintiff's name in either the *Post Office London Directory* or the *Army List* (1) for the present year, though I have searched both of these publications for it."

James Kaye, for the application :—

The case is one where payment out may be an irreparable injury to the Appellant in case his appeal should be successful, and under Order LVIII., rule 16, payment out ought to be stayed: *Touche* v. *Metropolitan Railway Warehouse Company* (2). *Brewer* v. *Yorke* (3) is strongly in favour of the application, and so is *Burdick* v. *Garrick* (4). The applicant, if successful, would have extreme difficulty in compelling a party who is resident abroad, and whose address he cannot discover, to refund.

Cozens-Hardy, Q.C., and *A. Young*, *contrà* :—

It is not a matter of course to stay distribution of a fund merely because there is an appeal which cannot be considered frivolous. There must be special circumstances.

[BAGGALLAY, L.J. :—Is it not a special circumstance that the Plaintiff has been abroad for two years and that the applicant cannot find his address ?]

The Plaintiff is a perfectly solvent person, and payment to him ought not to be stayed.

[THE COURT suggested that payment out should be stayed, on the applicant undertaking to indemnify the Plaintiff, if ultimately successful, against any loss which he might have sustained through not having been able to deal with the funds in the meantime.]

We have no evidence as to the solvency of the applicant, and a mere personal undertaking by him would not be satisfactory.

THE COURT then asked Mr. *Cozens-Hardy* whether he would prefer to give security for refunding in case the appeal should be successful, or to have payment out stayed till the hearing of the

(1) This was a mistake. The *Army List* for 1884 was produced in Court, and the Plaintiff's name appeared in it.

(2) 40 L. J. (Ch.) 496.

(3) 20 Ch. D. 669.

(4) Law Rep. 5 Ch. 453.

appeal, upon the applicant giving such security as mentioned in a minute handed down by Lord Justice *Fry* which is given below.

Mr. *Cozens-Hardy* elected the latter alternative.

The terms were, "On the applicant giving security to the satisfaction of the Judge in Chambers to pay half-yearly interest at £4 per cent. per annum on the present market price of the fund in Court to the Plaintiff, and to make good to the Plaintiff the difference (if any) between the highest market price of the investments at any time between the present day and the day of the hearing of the appeal, and the market price of the investments on the day of the hearing of the appeal." The Court added that there would be a direction to invest the cash, and that the applicant should ultimately have the benefit of the income of the fund in Court towards repayment of the £4 per cent.

The case stood over for a week that it might be ascertained whether the applicant would assent to these terms.

The case was mentioned again on the 5th of November, and the applicant declining to give the proposed security, the application was dismissed.

Solicitors for Applicant: *Markby, Stewart, & Co.*
Solicitors for Plaintiff: *Walker, Martineau, & Co.*

H. C. J.

C. A.
1884
PEARSON, J.
July 4.
C. A.
Nov. 5.

LE MAY *v.* WELCH.
In re LE MAY'S REGISTERED DESIGN.

[1884 L. 1136.]

Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 47—*New or Original Design.*

A design is not a proper subject of registration under the *Patents, Designs, and Trade-marks Act*, 1883, unless there is a clearly marked and defined difference involving substantial novelty between it and any design previously in use.

A design for a shirt collar was registered, the advantages claimed for which were—the height of the collar above the stud which fastened it in front, the cutting away of the corners in a segment of a circle, and the absence of a band. A collar was shewn to have been previously in use which had no band, and in which the corners were cut away in arcs of circles; but the cutting away was not so wide, and the height above the stud was not so great, as in the registered design:—

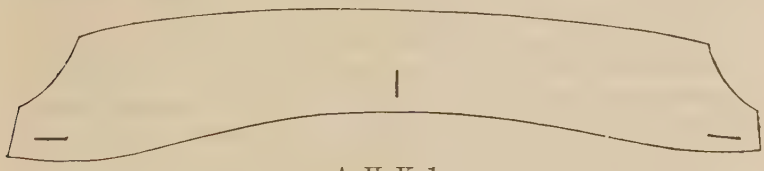
Held, that the registered design was not new or original within the meaning of the Act, and must be removed from the register.

ON the 4th of February, 1884, *W. H. & H. Le May*, hosiers, registered under the *Patents, Designs, and Trade-marks Act*, 1883, a design for a shirt collar, "The Tandem, Registered No. 1247," and on the 3rd of May commenced this action against the Defendants, *Welch, Margetson, & Co.*, to restrain an alleged infringement of the design.

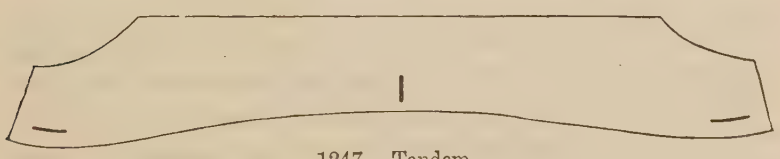
The Plaintiffs moved for an injunction, and the Defendants gave notice of motion under the Act to rectify the register by removing therefrom the above-mentioned design. The motions came on before Mr. Justice *Pearson*, and were disposed of on the 4th of July. The ground alleged by the Defendants for taking the design off the register was that it was neither new nor original, and did not differ in any material degree from other designs upon which collars had been manufactured and sold for the last fifteen years, and which had for that period been well known to the trade and the public. As regarded the injunction, the Defendants alleged that the collars made by them, of which the Plaintiffs complained, differed more from the Plaintiffs' design than that design did from several of the above old and well-known collars.

The foreman of the Plaintiffs in the collar department deposed that he had designed the "Tandem" collar, and that its merits were, that while it retained the smart appearance of the "Masher" collar, it by the semi-circular opening in front where there was a swelling in the throat, had all the comfort of a turn-down collar.

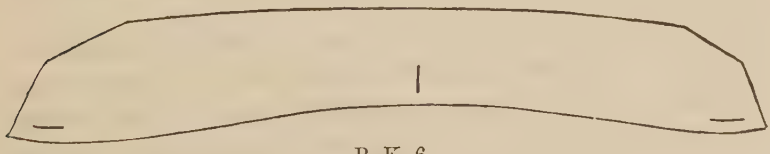
Numerous affidavits were filed made by persons in the trade, those on the one side stating that the design of the "Tandem" was new and original, and those on the other that it was neither new nor original. The designs of many collars used before the registration, and bearing more or less resemblance to the "Tandem," were put in evidence. The one particularly referred



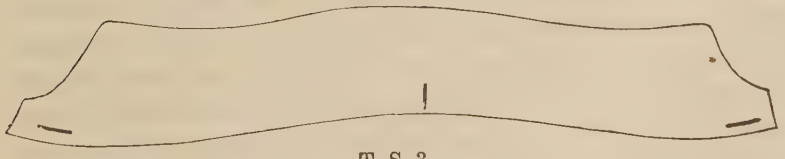
A. H. K. 1.



1247. Tandem.



R. K. 6.



T. S. 3.

to by Mr. Justice *Pearson* was R. K. 6, and that principally referred to by the Court of Appeal was A. H. K. 1. *Kerton*, a

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member of a firm of wholesale collar manufacturers, deposed that his firm had manufactured collars of the last mentioned design in the summer of 1883. Another manufacturer deposed that collars of the pattern T. S. 3 had been made by his firm and known in the trade for many years.

The advantages which the Plaintiffs alleged to exist in their collar were: 1. The absence of a band. 2. The depth between the stud and the top of the collar: and 3. The curved opening to prevent the collar from interfering with the chin.

The motions were heard before Mr. Justice *Pearson* on the 4th of July, 1884.

Higgins, Q.C., and *Swinfen Eady*, for *Le May & Co.*

Aston, Q.C., *Giffard*, Q.C., and *E. S. Ford*, for *Welch & Co.*

PEARSON, J.:—

The only excuse for this case having taken so much time is that I am told, and therefore believe, that commercially there is very great value in the Plaintiffs' design; otherwise, that something like three hours should have been expended in determining a question as to the shape of a collar, is something shocking to any person who knows the value of time.

The Plaintiffs complain that the Defendants, who are well-known hosiers, have infringed a registered design for the shape of a collar called the "Tandem." On the other hand the Defendants say that the design ought never to have been registered, for that it has nothing in it either novel or original. The only terms used in the Act which have to be complied with are that the person who claims to be registered must be the proprietor of a new or original design not previously published in the United Kingdom. The word "design" has a very wide meaning under the 60th section, and inasmuch as the Act allows the registration of designs not only with regard to shape, but also with regard to pattern, I cannot help coming to the conclusion, that the Legislature intended that matters apparently minute and trivial might nevertheless be registered under this Act. If I wanted authority for that I should say that *Holdsworth* v. *M'Crea* (1) in the House

(1) Law Rep. 2 H. L. 380.

of Lords shews that the Court must not dismiss applications as to designs simply because the subject matter of dispute seems to the Judge to be of the extremest triviality.

Now it appears to me that the design in the present case was intended as an improvement upon a collar that had previously existed. There had been, as we recollect, and as we see in pictures, collars very much larger than those worn at the present day, ending in front in points which were more or less sharp, and which accordingly, in order to avoid irritation to the face or chin, had to be turned down. It appears to have struck divers manufacturers that instead of the clumsy artifice of turning down the point of the collar, it would be better to improve the collar by removing these points altogether, and accordingly I have before me various specimens of collars that have been made from time to time, in which, in various ways, the difficulty in regard to the points has been overcome by removing a larger or a smaller proportion of the end of the collar, either by simply cutting off in a straight line the offending corner, or by taking it off in a curve, so as to leave an opening for the chin to work in. Many collars have bands to them. Apparently, according to modern ideas, it is desirable to do away with the band. I am told that this is a great improvement, and that the improvement consists in this, that if you choose then to have anything put into the collar and fastened by a button or an ornamental stud, and to wear a hankerchief round it, you can put the handkerchief below the stud, so that all that appears above it shall be collar and not band. There came into existence as I am told, I know not when, a collar known by the name of the "Masher" collar. This collar was completely square, so that when the ends came and joined together there was a square under the chin. Whatever advantages that may have had, it had evidently this disadvantage, that the stiffer it was, the less play there was for the head which was above it, and it appears to have struck the Plaintiffs that whereas that collar had the advantage to which I have before referred, that the handkerchief could be put below the stud leaving nothing but collar appearing above it, it would be a still further advantage if the top of the collar underneath the chin was cut away in such a manner as to give the chin easy play.

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Accordingly they cut away a certain portion of it in the shape of a curve, but in cutting that curve they took care to cut it so high above the botton-hole through which the stud passes as to leave a considerable portion of the collar between the lower part of the segment and the button-hole. The only collar I have had shewn me which at all closely resembles this is the one marked R. K. 6. No doubt in that collar very much the same thing was done that has been done in the design which the Defendants seek to remove from the register, for the collar was shaped in such a manner as to shew when it was buttoned a considerable part of the collar above the button. But there are these differences between that collar and the "Tandem," that in the "Tandem" the slope of the collar from the bottom of the segment down to the button-hole is much less than it is in the design R. K. 6, and that the segment of a circle is used instead of a straight line. A segment of a circle undoubtedly gives a larger opening for the chin than the straight line which was used in R. K. 6. No doubt the differences between the two collars are small, and the question that I have to determine is, whether or not there is a sufficient distinction between them to justify the registration of the present design. Now considering, as I do, that in any design with regard to a collar the differences must necessarily be small, I cannot say that these differences are so small as not to constitute a substantial difference between the collars, so far as the case admits of any substance at all. If I were to come to the contrary conclusion I think it would be almost impossible to decide that any collar could be registered at all, and if I were to come to that conclusion I think I should be defeating the purposes of the Act, which seems to me to have let the door open wide enough for the registration of any design that is either novel or original. Mr. *Aston* has argued that this design is neither novel nor original, because, as he says with great force, "You had the curve, you had the fall between the curve and the button-hole, and you had the scoop, if I may say so, to the collar, all previously used for the manufacture of a variety of collars." But then the question arises whether this particular combination is not different from other combinations of those elements, and I have come to the conclusion, after hearing this

long argument upon the subject, that there is in this collar something different from all previous collars, and having, as far as I can see, in all probability some advantages over them. The fact that the public have been able to discover some elements of difference between this and other collars, and that thereby the design of this collar has acquired an appreciable commercial value, seems to me to strengthen this conclusion.

I therefore must decide that this design was a design which could be properly registered under the Act, and I must refuse the application to strike it off the register.

[His Lordship then stated that the Defendants' collars were clearly an infringement of the Plaintiffs' design, and granted an injunction.]

C. A.

The Defendants appealed from the injunction and from the refusal to rectify the register. The appeals came on for hearing on the 5th of November, 1884—the appeal from the refusal to rectify the register being advanced by order.

Aston, Q.C., *Giffard*, Q.C., and *E. S. Ford*, for the Appellants:—

We say that the design ought not to have been registered, and that, if it ought, we have not infringed it. The difference between the Plaintiffs' collar and other forms of collars which were already in use and known in the trade is so trifling that it cannot be the proper subject of registration. *Thom* v. *Syddall* (1) shews that a similarity of principle in a design will not make it an infringement if there is a difference of style; and here our collars differ more from the Plaintiffs' registered design than that design does from some of the collars previously in use. The Plaintiffs' design cannot be considered new.

[BOWEN, L.J.:—How do you draw the line as to what is new?]

The patent law furnishes an analogy. Though a thing may be different from anything made before, yet if it is so like things already in use that anybody could make it, it is not the proper subject of a patent. *Holdsworth* v. *M'Crea* (2) shews that the

(1) 20 W. R. 291. (2) Law Rep. 2 H. L. 380.

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(1) 20 W. R. 291. (2) Law Rep. 2 H. L. 380.

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registration is of the entire design, and that copying a part is not an infringement; and, as laid down by Lord *Westbury* (1), that the protection of the statute only applies to the exact copy of the design registered. *Lazarus* v. *Charles* (2), *Mulloney* v. *Stevens* (3), and *Windover* v. *Smith* (4), all support the view that this is not a new and original design which can be protected.

Higgins, Q.C., and *Swinfen Eady*, *contrà*, were desired by the Court to confine themselves, in the first place, to the question as to the rectification of the register, since if the Court was against them on this point, the question of infringement would not arise.

The policy of the Act is to allow the registration of a design, however unimportant it may be, provided only it be new and original. Now ours is a new design with three characteristics :— 1. The height of the collar above the stud. 2. The cutting away of the corners in a segment of a circle. 3. The absence of a band ; and we ask the Court to come to the conclusion that this design is materially different from any of the earlier ones. Each of these elements may be found in some previous collar, but a new combination of them makes a new and original design. What the object of the peculiarities may be is of no consequence. The Act 5 & 6 Vict. c. 100, referred to ornamentation, and the Act 6 & 7 Vict. c. 65, refers to utility, but the present Act does not refer to either—it was intended to give a right similar to the right to a trade-mark. Our design is novel, according to the principles in *Harrison* v. *Taylor* (5). No one exhibit among all the designs put in evidence combines the same advantages as our collar.

[BAGGALLAY, L,J., referred to A. H. K. I. as very similar to the registered design.]

In that design there is not the same depth of collar round the neck in front, and the opening is not sufficiently wide for the play of the chin. These may appear trifling differences, but they make the Plaintiffs' design one of great commercial value.

(1) Law Rep. 2 H. L. 388.
(2) Ibid. 16 Eq. 117.
(3) 10 L. T. (N.S.) 190.
(4) 32 Beav. 200.
(5) 4 H. & N. 815.

A design must be capable of registration unless it is substantially identical with some design already in use.

BAGGALLAY, L.J.:—

On the 4th of February of the present year Messrs. *W. H. & H. Le May* registered under the *Patents, Designs, and Trade-marks Act*, 1883, a design for a collar which was numbered 1247, and the pattern or design is indicated by the drawing on the face of the certificate. Having obtained the registration of this design, Messrs. *Le May* now complain of an infringement by the Defendants, Messrs. *Welch, Margetson, & Co.*, who it appears are manufacturers in a similar line of business to the Plaintiffs. The Plaintiffs complain that the particular collar manufactured and sold by the Defendants is a close imitation of their protected design. That complaint has been met by the Appellants on two grounds; first, that the design was not a design which ought to have been registered, being neither new nor original; and secondly, that, if it was new or original, the collar manufactured by them was not an infringement. Not only did they defend the action, but they moved, under sect. 90 of the Act, to have the register rectified by expunging from it the entry of this design, upon the ground that it was not a design proper to be registered. Mr. Justice *Pearson*, when the matter came before him, was of opinion, for the reasons assigned by him in his judgment, that the design of the Plaintiffs was new, and was entitled to be registered; and, secondly, that what the Defendants had done amounted to an infringement of the protection afforded to the Plaintiffs, and thereupon he dismissed the motion of the Appellants for rectification of the register, and granted an injunction as prayed, in accordance with his view that the Defendants' collar was an infringement of the registered design. From that decision the present appeal is brought. It appeared to us, at an early stage of the hearing of the appeal, that the substantial question was whether or not the design ought to have been registered, and that if it ought, there was much to be said in support of the view that what the Appellants were doing was an infringement. It was urged that if the design ought to be registered, though there were only small differences between

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it and previous designs, the same rule ought to be applied as to infringement, and that a trifling difference between the collars of the Plaintiffs and of the Defendants would prevent the Defendants' collars from being an infringement. That is not the right way to deal with the case; the proper way of dealing with it is to see, whether the registration should be maintained, or the design removed from the register.

Baggallay, L.J.

Mr. Justice *Pearson* gave great care and attention to this case, and, if all the materials necessary for deciding the matter were those stated in his judgment, I should have had a strong inclination, if not to agree with it, at least not to interfere with his decision. But it appears to me that there were materials in evidence which were not sufficiently brought to his attention, or, if brought to his attention, were not sufficiently considered by him when he gave his judgment. Here is a collar of a particular shape, which the Plaintiffs call the "Tandem" collar; it encircles the neck, as all collars do, but it has no band, like the old-fashioned collars; it has a stud-hole at the bottom, leaving a considerable amount of space above, not only up to the line where the collar encircles the neck, but a broad rim below the cut in the collar, which cut has been referred to so much, and has been called a segmental cut. A more correct way of describing this cut would be, that there was a wedge-like opening cut into an all round collar, this opening being formed by two arcs of a circle meeting at the lowest point, and representing the upper part of a Gothic arch, but of course inverted. In that state of things the Plaintiffs' case is met by the production of a number of collars which were made within four or five years of the date when they obtained registration of their design. Some of the earlier collars have bands, but in other respects much resemble the Plaintiffs'. Of course, it does not appear from the registration in what the excellence of the design consists, that is left to the ingenuity of the Plaintiffs' counsel to make out in Court, but we are told by Mr. *Higgins* that the novelty of the design consists in the combination of three characteristics, the first being the absence of the band, the second the distance between the stud and the upper part of the collar, and the third what is described as a segmental opening, an opening over the stud for the purpose of allowing the chin to

go into the opening, and so giving more easy play to the neck. We may take it that those are the three characteristics of the Plaintiffs' collar. The Plaintiffs say that although each of those characteristics existed in other collars, they have been the first to combine them all, as is done in this design, and that the design is therefore new. But are the Plaintiffs right in so saying? We have had a number of collars produced before us which were in use before the date of this registration. I will notice one in particular, the exhibit marked A. H. K. 1. When I examine that collar I am bound to say that it has the exact combination of all the three elements which the Plaintiffs consider to constitute their design. I do not mean to say that there may not be differences in the proportions of the several parts, but all the characteristics are there to be found. Now that exhibit was manufactured and sold in 1883, some months before the Plaintiffs' collar was registered. The same witness who proves that collar produces another also combining the three characteristics, which he says had been on sale three years previous to the date of registration. However, I do not refer so much to that one as to A. H. K. 1. Again, in T. S. 3, I find all the three elements combined, and I should hardly take the same view as Mr. Justice *Pearson* has taken of R. K. 6. On the designs being handed up to us, we all thought that A. H. K. 1. more closely resembled the Plaintiffs' registered design than the collar of the Defendants does.

In order to justify the registration of a design, especially with reference to such matters as collars and other articles of dress which are in constant and daily use, there must, according to my view of the case, be some clearly marked and defined difference between that which is to be registered as a new design, and that which has gone before. If the difference of half an inch in the placing of a stud, or any other similarly trifling difference from previous designs, were to be taken as justifying registration of a design for a collar, no one could have a collar made in his own house by his servants without running the risk of infringing some registered design. It would be oppressive in the extreme, if any trifling change in the shape of such an article as this, would justify the registration of the design so as to preclude all the rest of the

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world from making an article of the same or like form. Upon this ground it appears to me that the case is not brought within the 47th section of the Act, which only permits registration of a new or original design. In my opinion this is not a new or original design, the registration of it therefore was a mistake, and the register ought to be rectified by its removal.

BOWEN, L.J.:—

I am of the same opinion. In order to enable the Respondents to maintain the registration, they must be, or claim to be, the proprietors of a new or original design. In the present case is there any new or original design shewn by this drawing? In considering whether the design is new or original, we must remember in the first place that we are dealing with a design which purports to found itself on shape, and to deal with outline; and secondly, that we are considering the question with reference to an article of dress of the very simplest and least complicated kind, an article of dress which may well vary in form in every town in *England*, and in every year in which collars are worn. We must not allow industry to be oppressed. It is not every mere difference of cut, every change of outline, every change of length, or breadth, or configuration, in a simple and most familiar article of dress like this, which constitutes novelty of design. To hold that would be to paralyse industry and to make the *Patents, Designs, and Trade-marks Act* a trap to catch honest traders. It cannot be said that there is a new design every time a coat or waistcoat is made with a different slope or a different number of buttons. Tailoring would become impossible if such were the law, and it does not appear to me that such is the law. There must be, not a mere novelty of outline, but a substantial novelty in the design having regard to the nature of the article. Now in the present case is there substantial novelty? That is an issue of fact to be decided by the view. Mr. *Higgins* says, and in that I am disposed to agree with him, that a new combination of old elements of design will satisfy the Act, and he asks us to find such novel combination in the presence, for the first time, in his article, of three characteristics; the absence of band, the downward curved opening, and the large share of collar above the

button. Now the answer which seems to go to the root of his contention is this, that if you take the specimen which the Lord Justice has dwelt upon as the most conspicuous instance, you will see that Mr. *Higgins'* contention is not well founded. The Plaintiffs' collar, it is true, differs from A. H. K. 1 by exaggerating one or more of the characteristics which are there combined; but I can find in it no other novelty. It would be a most dangerous view of this Act to allow a design which presents no other element of novelty than this, to have the benefit of registration.

FRY, L.J. :—

I should have been content to express my concurrence with the judgment of my learned Brethren very shortly, were it not for the fact that in the present appeal we are about to differ from the decision of the learned Judge below, and also that it involves the interpretation of an important Act of Parliament. For those reasons I propose to state at more length the grounds of my judgment.

The question which arises is this, was the design, at the date of registration, either novel or original. Either one or the other will satisfy the terms of the Act. Now what is the meaning of those words as applied to a design in the Act? It has been suggested by Mr. *Swinfen Eady* that unless a design precisely similar, and in fact identical, has been used or been in existence prior to the Act, the design will be novel or original. Such a conclusion would be a very serious and alarming one, when it is borne in mind that the Act may be applied to every possible thing which is the subject of human industry, and not only to articles made by manufacturers, but to those made by families for their own use. It appears to me that such a mode of interpreting the Act would be highly unreasonable, and that the meaning of the words "novel or original" is this, that the design must either be substantially novel or substantially original, having regard to the nature and character of the subject matter to which it is to be applied.

It appears to me that this conclusion is in consonance with previous decisions upon a similar Act of Parliament. The

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matter came before Lord *Hatherley* in the year 1870 in the case of *McCrea* v. *Houldsworth* (1). There the Lord Chancellor said: "It has been argued that when a design of this kind is registered, and the designer, instead of describing the design in words, chooses to place the design itself upon the register in the shape of a part of the article designed, then he is tied down to that identical design so exhibited, and is not at liberty to complain of any person making a thing which is to all outward appearance exactly the same, and which for all purposes for which the thing is manufactured is identical. And it has been argued, that if the person who exhibits a design for all practical purposes identical with the registered design, is astute enough, as in this case, to turn what is called a star in the opposite direction upon the pattern, though it is of exactly the same dimensions and effect to the eye, he may do so with impunity." The Lord Chancellor rejects that argument, and further on he says: "If the designs are used in exactly the same manner, as I hold they are in this case, and have the same effect, or nearly the same effect, then of course the shifting or turning round of a star, as in this particular case, cannot be allowed to protect the defendants from the consequences of the piracy." The Lord Chancellor, therefore, held that it was not necessary to have identity between the registered design and the design which was said to be an infringement of it. A similar rule appears to apply in the comparison of designs which existed previous to the registration. In the year 1873 the case of *Lazarus* v. *Charles* (2) came before Vice-Chancellor *Malins*, and there the learned Judge said this: "Unless the design is new and original it cannot come within the statute" (the words of the statute were the same then as now, except that the word "and" was used instead of the word "or"), "and although it may be pretty and ornamental, it is not on that account entitled to protection, and, as far as I am able to judge, I have come to the conclusion that it is neither a new nor original design within the meaning of the statute, and on that ground, if the case depended upon that alone, I should be adverse to the contention of the plaintiffs; and though the Courts have shewn much more liberality in dealing with cases under the Act for

(1) Law Rep. 6 Ch. 418, 419. (2) Law Rep. 16 Eq. 117, 121.

registration of designs, than under the Act giving protection by means of patents, yet the same principle applies as to patents, and people who manufacture articles with only a slight alteration in form from other articles already manufactured, should not rush into the mistake of registering their design, thus causing an embarrassment to trade." The opinions thus expressed by Lord *Hatherley* and Vice-Chancellor *Malins* appear to give the true light in which this Act ought to be interpreted. I think that unless the design be in substance either novel or original, it is not novel or original within the meaning of the Act. I observe with satisfaction that the learned Judge in the Court below, from whose decision we differ, proceeded on the same lines as ourselves with respect to the principles on which the Act should be construed.

That brings me to the second question, was the design of the Plaintiffs substantially novel or original? That is a question which clearly must be answered mainly by the eye. You must take the collars which existed before February, 1884, and the collar which was registered on that date, and ask yourself the question whether the two collars are substantially the same in design. I will not go over the ground which has been gone over already by my learned Brethren, but will only say that I concur in the view which they have expressed, that there is no substantial difference between the Plaintiffs' design and the design of some of the old collars, and therefore no substantial novelty in the new design. It has been said that if we so hold, the result will be that no shirt collar can be registered. That is a conclusion which to my mind is neither astonishing nor alarming. It is not astonishing when we regard the fact, of which we may take judicial cognizance, that shirt collars have been worn for many years, and that the fashion has been changing perpetually with regard to their form and design, and it will not be any great calamity to the world if it proves impossible to register a design for them. I concur in the conclusion that the learned Judge erred in holding that there was sufficient novelty in this design to make its registration proper, and consequently these appeals will be allowed with the usual results.

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The Appellants asking to have two orders, one in the action and the other on the application to rectify the register, the Court held that they were entitled to have separate orders.

Solicitors for Plaintiffs: *Hicklin, Washington & Pasmore.*
Solicitors for Defendants: *Phelps, Sidgwick & Biddle.*

H. C. J.

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[1884 P. 1684.]

Practice—Security for Costs—Trustee of Bankrupt's Estate suing in his Official Name—Insolvency—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 83—*Rules of Supreme Court*, 1883, *Order* XVII., *rr.* 4, 5.

A trustee of the property of a bankrupt brought an action in his official name, his own name not being mentioned. The Defendants moved for security for costs on the ground of his insolvency, and of his suing solely in his official name. Evidence was given that he had been bankrupt ten years previously, and had also compounded with his creditors four years before the action was brought:—

Held (affirming the decision of *Pearson*, J.) that the evidence of the insolvency of the Plaintiff was insufficient; and that the fact of his suing solely in his official name was not a ground for ordering him to give security for costs.

When a trustee in bankruptcy suing in his official name is removed, and a new trustee appointed, the new trustee must obtain an order to continue the action, and give notice thereof to the other parties, under Order XVII., rr. 4, 5.

Whether a trustee in bankruptcy suing in his official name would, if insolvent, be ordered to give security for costs, *quære*.

Denston v. *Ashton* (1) questioned.

THIS was a motion on behalf of the Defendants, Sir *Charles Whetham*, the *Metropolitan Bank*, and *Frederick Nalder*, that the Plaintiff, *Archibald George Buttifant*, who sued as "the trustee of the property of *Alexander Gopsell Pooley*, a bankrupt," his own name not being mentioned on the record, might be ordered within seven days to give security in the sum of £100 for the Defendants' costs of this action, and that in the meantime all proceedings in the action might be stayed as against the Defendants.

(1) Law Rep. 4 Q. B. 590.

From the affidavits in support of the motion it appeared that in the year 1874 *Archibald G. Buttifant* was adjudicated bankrupt in the County Court of *Norwich*, and that he subsequently left the country and no statement of affairs was ever filed. He obtained his discharge in June, 1881, his estate having paid 10*d.* in the pound.

In July, 1880, proceedings were instituted by *Buttifant* in the County Court at *Chelmsford* for liquidation by arrangement with his creditors, and the debtor received his discharge on the 9th of August, 1880.

It further appeared that in May, 1879, an account was opened with the *Royal Exchange Bank* in the name of *Edward Percival & Co.*, and the only person authorized to draw cheques on the said account was *Arthur George Buttifant.* This account was closed in August, 1879. Previously thereto, that is on the 26th of July, 1879, *Arthur George Buttifant,* who was in fact the Plaintiff *Archibald George Buttifant,* opened another account with the *Royal Exchange Bank,* in the name of *Arthur George Buttifant.*

Between the 29th of August, 1879, and the 13th of August, 1880, several cheques were drawn on the *Royal Exchange Bank* by *Arthur George Buttifant,* all of which were returned to the holders thereof in consequence of there not being sufficient funds in the hands of the bank to meet the same; and on the 4th of October, 1880, a cheque was also drawn by *Arthur George Buttifant* on the bank for £23 12*s.* 6*d.*, which was returned to the holder marked "account closed."

This action was brought to obtain a declaration that an order made in an action entitled *Pooley* v. *Whetham,* being an order for determining all questions in such action, was fraudulent and void, and to set aside the same on the ground of fraud, misrepresentation, and collusion between the Defendants in the action or their agents, and the Defendant *Holt,* who was the trustee in bankruptcy of the Plaintiff at the date of the order in such action, and for an injunction to restrain the Defendants from distributing or parting with moneys, stocks, and other securities, forming part of the proceeds of the sale of the *Jersey Railway* (being the subject-matter of the action) and for damages. And it was alleged that

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this litigation would necessarily be costly, and that the expenses would amount to considerably more than £250.

Higgins, Q.C., and *Northmore Lawrence*, for Sir *C. Whetham* and the *Metropolitan Bank*:—

We submit that where a plaintiff is suing as trustee for a bankrupt the rule is, that he must give security for costs. In *Malcolm* v. *Hodgkinson* (1), where the plaintiff in an action of trover filed a petition for liquidation by arrangement and a receiver was appointed under the Bankruptcy Rules, the plaintiff was ordered to give security for costs. Mr. Justice *Blackburn* there said, "Where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs." In this case the Plaintiff is suing as trustee for a bankrupt in an action which will necessarily be an expensive litigation, and there is sufficient evidence to shew that his ability to pay the costs if ordered to do so is exceedingly doubtful and we ought not to be harassed by a person in such circumstances. It is settled by the case of *Ex parte Angerstein* (2) that if a trustee in bankruptcy makes an unsuccessful application to the Court he will be ordered to pay the costs, and if the estate is insufficient the trustee must pay the costs personally. *In re Palmer* (3) and *Cobbett* v. *Warner* (4) are also in our favour.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the *Royal Exchange Bank*.

Cookson, Q.C., and *Emden*, for the Plaintiff:—

The question in this case is settled by the authority of *Denston* v. *Ashton* (5), where it was held that the Court will not require security for costs to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate although he is in insolvent circumstances. And the same was held in the case of an executor in *Sykes* v. *Sykes* (6). In the case of *Malcolm* v. *Hodgkinson*, cited in support of this application, the plaintiff became bankrupt after the commencement of the action. Here

(1) Law Rep. 8 Q. B. 209.
(2) Ibid. 9 Ch. 479.
(3) 19 Ch. D. 409.
(4) Law Rep. 2 Q. B. 108.
(5) Ibid. 4 Q. B 590.
(6) Ibid. 4 C. P. 645.

the Plaintiff, though he was a bankrupt many years ago, has since paid all his debts, and there is no ground for alleging that he is at present insolvent or incapable of paying the costs. After his discharge he is freed from all liability for former debts.

Higgins, in reply:—

What we contend is, that the Court has inherent jurisdiction to enforce security for costs whenever the circumstances require it. That was laid down in *Lydney and Wigpool Iron Ore Company* v. *Bird* (1) and *Martano* v. *Mann* (2). We submit that there is sufficient evidence in this case to shew that the Court ought to order the Plaintiff to give security for costs.

PEARSON, J.:—

This case, no doubt, raises a very important question, and a question which, to my mind, whenever it should be raised before the Court of Appeal, will have to be very seriously considered. An action has been instituted in the name of the trustee of a bankrupt, *Alexander Gopsell Pooley*, against several Defendants, and there is now an application made to me in that action that the Plaintiff so described, and not by his own name, but simply by his official title, may give security for costs. Among other suggestions that have been made has been this, that inasmuch as he has described himself simply by his official title and not by his own name, the Defendants will have no right to an order for costs against him personally if he shall fail in his action and be ordered to pay costs. To that argument I cannot accede. The right to sue by his official title is given by the *Bankruptcy Act* of 1869, which authorizes the trustee in bankruptcy to sue and be sued by his title. I do not understand that that section of the Act in any way relieves the trustee in bankruptcy from the personal liability under which he was before, to pay any costs which may be ordered to be paid by him simply because he sues by his official title, and not by his individual name; I think the Court would have the same jurisdiction to order him personally to pay the costs which it had before. That seems to me to be confirmed by the case of *Ex parte Sheard* (3), before

(1) 23 Ch. D. 358. (2) 14 Ch. D. 419. (3) 16 Ch. D. 110.

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the Court of Appeal, in which as far as I can make out the trustee had made his application and appealed in his own name, and, although he had sued in his own name, the Court held that, inasmuch as he had no opportunity of arguing the appeal, because he had been removed pending the appeal, and a new trustee appointed in his place, who declined to go on with the appeal, they could not order him personally to pay the costs. Now, it seems to me that that case goes a long way to shew that in every case in which a trustee in bankruptcy sues, if there be the slightest reason to doubt his solvency, the Court ought to have jurisdiction, and probably has it, to require him to give security for costs, because that case seems to me to determine that if he is removed and a new trustee appointed, who does not choose to go on with the suit, it does not follow, as a matter of course, that the trustee who has been removed is personally liable for the costs of the action, and inasmuch as any trustee is liable to be removed by the Court in bankruptcy without the knowledge, or consent, or privity in any way of the defendants to the action, who have no control, and may not have any *locus standi* in the Court of Bankruptcy, it seems to me that that would furnish a reason, and a very strong reason, why the defendants in any action should be at liberty to require security for costs from any trustee who brings an action against them.

But the case here is supported as far as the trustee is concerned by the decisions of the Common Law Courts, and one of them in particular, the case of *Denston* v. *Ashton* (1), which seems to me to shew that, at all events, the opinion of the Common Law Courts in the year 1869 was that you cannot require security for costs from a trustee in bankruptcy, even if he be insolvent, on the ground that he is insolvent, that poverty is no ground for requiring security for costs from a trustee, inasmuch as it is no ground for a defendant requiring security from a plaintiff who sues in *propria persona*. If I may be allowed to say so, with all respect to the learned Judges who decided that case in opposition to the opinion of Mr. Justice *Willes*, whose decision they overruled, I prefer the opinion of Mr. Justice *Willes* to the opinion of the Court of Appeal, and when they give as their reason, another

(1) Law Rep. 4 Q. B. 590.

case in the Common Pleas, in which they had overruled the decision of the present Master of the Rolls, who required security, and compared the case of executors to the case of a trustee in bankruptcy, and say if you cannot require security from executors so you cannot require security from a trustee in bankruptcy, I am bound to say I cannot follow that reasoning. An executor seems to me to stand in a very different position from that of a trustee in bankruptcy. The executor represents a testator who may possibly have begun an action in his own lifetime, and would not have been required to give security, and if you could not require a testator himself to give security I can see no principle on which you should require the executor to give security. But when you come to the case of a trustee in bankruptcy, it is admitted that a bankrupt could not have proceeded with the action, because you might at once have pleaded bankruptcy, and there would have been an end of it, and you are then dealing with a case where the trustee is not suing for his own benefit at all, but where *ex necessitate* if there be a bankruptcy your right is to go against the bankrupt's estate for your costs if the trustee cannot pay you, and you have, practically speaking, no chance of being paid those costs. They would not take precedence of all the debts of the creditors, and you would only be entitled to a dividend with other creditors. It strikes me that the case of an executor and the case of a trustee in bankruptcy are not *in pari materiâ*. If the case were left to me to decide, without any regard to authority on the point, I should be very much disposed to say that if there be the slightest suspicion of the trustee not being able to pay the costs, the trustee ought to give security, and I am not at all sure that if such a case were before me I should not make that decision, stating it, as my opinion, that in that case a trustee ought to be bound to give security, and leaving it to the Court of Appeal, if they thought I was wrong, to reverse me. But the case I have to deal with is this: A gentleman of the name of *Buttifant* has been appointed trustee in Mr. *Pooley's* bankruptcy. I cannot assume that the Court of Bankruptcy has done wrong in appointing Mr. *Buttifant* trustee. I must assume that every thing was done as it ought to have been done, and I must assume, therefore, that Mr. *Buttifant* was properly and rightly,

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according to the exercise of a wise and just discretion, appointed trustee in Mr. *Pooley's* bankruptcy. That being so, he is a proper Plaintiff in this action if he has any right whatever in respect of the bankrupt's estate against the Defendants. Then it is said, that being so, you must look at Mr. *Buttifant*, and, knowing that he is not suing for himself, but suing as trustee for another person, in the same way as you would if you were inquiring into a suit by a next friend on behalf of a married woman, require security from a next friend, if he were insolvent, you ought to require security from Mr. *Buttifant*. But the only evidence before me is evidence which comes down to at least four years ago. Mr. *Buttifant* has been bankrupt once, and as I understand paid a dividend of 10*d.* in the pound. He was concurrently in liquidation, but whether he paid anything in that liquidation or not is not before me. Those circumstances, undoubtedly, are very suspicious; but he got his discharge in bankruptcy in 1881, and received his discharge also in the liquidation. The order was made in June of that year, though not passed and entered till September. He was appointed trustee in this bankruptcy in 1883, and there is not in the affidavits filed in this case the slightest suggestion that if the costs are given against Mr. *Buttifant* in this action he is not able to pay them.

Under these circumstances I must refuse this application, but refusing it under circumstances so suspicious as these, I do not hesitate to say that under the present practice, which allows applications for security for costs to be made from time to time and at any time, if at any later period the case shall be brought before me on a similar motion to this, with proper evidence to shew that the trustee is not a solvent man, I should certainly have no hesitation whatever in entertaining that motion, and in deciding whether under the circumstances then proved I ought not to require security for costs. I can only dismiss both these motions with costs.

T. W. G.

C. A. From this order the Defendants appealed. The appeals were heard on the 6th of November, 1884.

On the hearing of the appeal a fresh affidavit by the managing

clerk of the Defendants' solicitors was read, from which it appeared that in April, 1883, all the furniture and effects in the Plaintiff's house, which belonged to his father-in-law, were assigned to trustees for the benefit of the Plaintiff's wife. The deponent also stated as follows, "I have caused inquiries to be made as to the position, pecuniary and otherwise, of the said *A. G. Buttifant*, and I say from the result thereof I verily believe that the said Defendants would not be able to recover from him the amount of their costs if the said action is brought to trial and judgment given in favour of the Defendants."

"I have been informed, by a creditor of the bankrupt *Pooley*, and believe, that he has made inquiries as to the assets of the bankrupt, and ascertained, and I believe it is the fact, that there is no property of the bankrupt in the hands of, or recoverable by the trustees, which is or can be made accountable towards payment of the costs of this action."

Grosvenor Woods (*Cozens-Hardy*, Q.C., with him), for the *Royal Exchange Bank*, and

Higgins, Q.C., and *Northmore Lawrence* for *Sir C. Whetham* and the *Metropolitan Bank*:—

The evidence of insolvency would be sufficient in an ordinary case to induce the Court to order the plaintiff to give security for costs. But in the present case there is the additional ground that there is no personal plaintiff. A trustee in bankruptcy is personally liable for costs: *Ex parte Angerstein* (1). But here the Plaintiff sues as a *quasi* corporation under the 83rd section of the *Bankruptcy Act*, 1883, which enacts that the trustee may sue and be sued by the official name of "the trustee of the property of the bankrupt." His name does not appear on the record, and he may resign or be removed and another trustee appointed without any notice to the Defendants. For there is no such transmission of interest or liability as to bring the case within Order XVII., rule 4 (2), so that when the trial comes on

(1) Law Rep. 9 Ch. 479.

(2) Order XVII., rule 4. "Where, by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming

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the Defendants will not know to whom to look for costs. Therefore the Defendants ought to have security for costs, even though the evidence of insolvency would not be sufficient in an ordinary case. Two cases have been cited against us, namely, *Denston* v. *Ashton* (1), and *Sykes* v. *Sykes* (2), but those were both cases where the plaintiff was personally on the record.

Cookson, Q.C., and *Emden*, for the Plaintiff, were not called on.

BAGGALLAY, L.J.:—

These are two appeals from orders of Mr. Justice *Pearson* made on the 18th of July last, by which he refused with costs two applications made to him by two of the Defendants in the action that security might be given by the Plaintiff for costs.

I may just refer in the outset to rule 15 of Order LVIII., which provides for the giving of security for costs in the case of appeals. The last words of the rule are: "Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." There are certain circumstances which have from time to time been recognised as special circumstances within that rule, and the first and foremost has been the insolvency of the appellants. The two grounds on which security is asked in the present case are, first, that the Plaintiff is insolvent, and secondly, that if the Court is not satisfied on that point, then the character which he fills as trustee in the bankruptcy of *A. G. Pooley* is such as to entitle the Appellants to security for costs. I will deal first with the allegation that the Plaintiff is in insolvent circumstances. I can see no evidence of insolvency

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into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the Court or a Judge upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

(1) Law Rep. 4 Q. B. 590.

(2) Ibid. 4 C. P. 645.

such as the Court is in the habit of requiring when it proceeds upon insolvency as a special circumstance. It appears that the present Plaintiff became bankrupt in 1874, and absconded and only paid tenpence in the pound. However that may be, he obtained his discharge in June, 1881, three years before the present application, and two years before he was appointed trustee in the bankruptcy of *Pooley*. In addition to that, it is also stated that he made a composition with his creditors in 1880, and that at the first general meeting of his creditors he received his discharge. Therefore there was no evidence before the learned Judge in the Court below, other than that I have just referred to, to indicate that he had been in circumstances such as not being able to meet his engagements or pay his debts subsequent to the month of June, 1881. Are we to assume that because a person in June, 1881, received his discharge in bankruptcy, therefore in July, 1884, he is not in a position to pay his debts and meet his engagements as they may arise from time to time? I do not think we are. Upon the evidence before him, I think the learned Judge in the Court below arrived at a perfectly right conclusion.

Then what is called additional evidence has been brought before us, and that divides itself into two parts. The first part is an allegation that the Plaintiff was living in a house, the furniture of which had been supplied by his wife's father who settled it on his daughter. It is not a very unreasonable thing for a father to do, to make that property which he gives for the benefit of his daughter secure to her. It would be carrying the allegation of insolvency to a much greater length than it has ever been carried before, if we were to say that because a man's father-in-law settles property upon his daughter, therefore that man is insolvent.

The other additional evidence I am sorry to see introduced into an affidavit for the purpose of affecting the reputation of an apparently solvent man. [His Lordship read the allegations in the affidavit before set forth, and continued:—] There is not a tittle of reference to any particular inquiries that were made or any particular information that was received. It is merely that the deponent believed from what he had heard. If people's

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reputations are to be taken away by broadcast allegations such as these, it is a very sad thing, and I am certainly sorry to find such paragraphs introduced into an affidavit before the Court of Appeal. I have therefore come to the conclusion that there is no such evidence as this Court has been in the habit of requiring upon questions of security for costs as to the insolvency of the person required to give it.

As regards the other point, it is raised in this way. It is said that by reason of the Plaintiff being described as trustee in the bankruptcy of *Pooley*, there will be no sufficient security for the costs of the Appellants in the event of the decision going against the Plaintiff. Now as long as the present Plaintiff is trustee, it is beyond all question, and I agree with Mr. Justice *Pearson* on that point, that he is liable for the costs. But then it is suggested that he may be removed from being trustee, and somebody else may be appointed, and some question may arise as far as regards his liability for costs after he has been removed. Any difficulty of that kind is removed by a consideration of the 4th rule of Order XVII. (1). [His Lordship read the rule.] If no person is appointed in his place, the present Plaintiff remains liable as the Plaintiff in the action. If another person is appointed in his place, from the time when that other person becomes the nominal Plaintiff by the effect of the rules under the *Judicature Act* that new person becomes liable, and if he is not solvent the Defendants can obtain an order for security for costs. It appears to me that all the grounds on which Mr. Justice *Pearson* decided this case are quite right, that the order he made was right, and that the appeal must be dismissed with costs.

I deem it unnecessary to consider, in the view which I have taken of this case, how far we ought to affirm or overrule the decision of *Denston* v. *Ashton* (2). That decision went as far as this, that in a case similar to the present, with the addition of the insolvency of the plaintiff, the Court would not make an order for security for costs. Whether that view would be entertained by this Court is not for us to say. At present I see no reason to dissent from it, but I have not fully considered the point, and therefore express no opinion about it.

(1) See note (2), ante, p. 45.

(2) Law Rep. 4 Q. B. 590.

BOWEN, L.J.:—

I am of the same opinion. This is an application for security for costs, upon the ground that the Plaintiff, who is the trustee of an insolvent, is himself an insolvent. Suppose it was made out that he was insolvent, the question would arise whether the case falls within the principle of those in which the Court orders a plaintiff who is suing nominally only on behalf of others really interested to find security for costs. It has been said in the cases of *Sykes* v. *Sykes* (1) and *Denston* v. *Ashton* (2), that this principle only applies to cases of nominal plaintiffs strictly so called, and is not to be extended to the case of assignees in bankruptcy. Whether we should agree or not with the decision in the cases of *Sykes* v. *Sykes* and *Denston* v. *Ashton* I say not, for the best of all reasons, that it seems unwise that Courts should decide that which they are not called upon to decide. The point does not arise if the fact is not made out that the present Plaintiff is insolvent.

Upon the point whether he is proved to be insolvent I will not add one word to what has been said by Lord Justice *Baggallay*, except that I entirely concur with him that there has been a complete breakdown of the evidence on that point.

But then the counsel for the Appellants have argued that, assuming our judgment is against them upon the fact, and that insolvency is not made out, nevertheless this is a very special case because there is here no real plaintiff, and therefore the Court has a right to see for the purposes of justice that there is some tangible person to stand the brunt of the costs in case the action turns out to be unfounded. That argument has been based on the assumption that in a case of litigation commenced by a trustee suing by the official title of the trustee in a bankruptcy, there is no real plaintiff. Is that so? It would be a most singular effect of legislation if it were to be held that an Act of Parliament has enabled trustee after trustee of a bankrupt, at any given moment, by their own free will, to slip out of the litigation and leave nothing at all behind to answer for costs incurred. Corporate and *quasi* corporate bodies are not unknown to the Legislature. Ministers who represent great departments of

(1) Law Rep. 4 C. P. 645. (2) Law Rep. 4 Q. B. 590.

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state are often clothed by the legislature with a corporate or *quasi* corporate capacity; but that the trustee of a bankrupt should have this extraordinary privilege conferred upon him of being able to sue in his own official name and by reason of the section should be also entitled at any given moment to quit his shell and leave no liability for costs behind him for the new trustee to take up, and that this process might be repeated as often as the successive trustees chose, to the utter confusion of the litigant on the other side, would be to me a marvel of legislation. I do not think any such result is produced by the section. I do not think that a trustee in bankruptcy has been made a sort of ghost of this kind—a mere wraith without substance who may disappear from time to time without notice from the scene. What is the legislation? First you have a statutory devolution of estate by which the property passes to the trustee; but you have also this —you have power given to the creditors to change trustees and substitute new ones. At every single change there is a new devolution of estate, and that the rights and interests of the old trustee vest in the new one when the proper formalities are gone through I doubt not. But it does not follow that this devolution can take effect in an action against the opposite party without his knowledge and without notice to him simply because there is a devolution which when the proper procedure is adopted may enable the new trustee to come in and take up the litigation where the old trustee has left it. The mere fact that a trustee may be removed proves nothing of the sort; it only proves that there is the devolution. If we are to consider what is the effect of this devolution taking place during litigation we find rules 3 and 4 of Order XVII. deal with that subject. Just as when there is a devolution by death,—just as when there is a devolution by bankruptcy, so when there is a devolution by succession of trustees in a bankruptcy you must follow the procedure pointed out by the rule; that is to say, the new person must get an order which will give the other side notice that a new plaintiff has been substituted for the old plaintiff, and that henceforward the new plaintiff is the person to look to. There can be therefore no injustice. Then is there anything in the statutes in bankruptcy which shew that the trustee is to be dealt

with in any other way? The counsel for the Appellants have tried to extract this doctrine of a succession of ghosts out of the words that "a trustee may sue by his official name." That simply seems to me to mean this, that the person who is trustee and clothed with the representative character of trustee, representing the estate of the bankrupt and the interests of those interested in the estate, may sue stating that he does so in his official character. It does not say he may slip out of the action without notice to the other side. It does not interfere with the portion of the procedure I have referred to. It would be as unjust to suppose that a trading firm because it can sue by its firm name can privately change its members and still carry on the old action as to suppose that a trustee may be changed without notice and leave the defendant litigant in the cold when he comes to ask for his costs.

FRY, L.J.:—

Two points have been urged upon us in the present appeals. The first is this. It is said that the Plaintiff, Mr. *Buttifant*, is the insolvent trustee of an insolvent estate, and as such ought to be required to give security for costs. Upon the evidence I have come to the conclusion which my learned Brethren have arrived at, that it is not shewn that Mr. *Buttifant* is insolvent, and I desire to add nothing but this, that the very point upon which the evidence broke down is pointed out by the learned Judge, and that when the defect of evidence is apparent, evidence subsequently tendered to make good the defect must be viewed with the utmost jealousy.

Taking that view of the facts, it is unnecessary to express any opinion as to what would have been the proper decision if the facts had been otherwise, and it is unnecessary to express any opinion upon such cases as *Sykes* v. *Sykes* (1) and *Denston* v. *Ashton* (2). I only desire to say that the consideration of those cases is entirely unaffected by my decision in this case.

The second point urged upon us is this. It is said that in the present case Mr. *Buttifant* is suing as trustee of the estate of Mr. *Pooley*, and that whenever the trustee of a bankrupt estate sues in his own official name he is, as Mr. *Higgins* has described

(1) Law Rep. 4 C. P. 645. (2) Law Rep. 4 Q. B. 590.

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him, a *quasi* corporate plaintiff, and that the defendants have no means of knowing when the persons who fill that office are changed from time to time; in other words, he represents the trustee of a bankrupt's estate as a sort of permanent mask, which carries on the litigation, behind which there may stand at one time one real man, at another time another real man, and at another time, nobody at all; and it is said that such a plaintiff is one from whom security ought to be required. Now, if the plaintiff who sues as trustee answers to that description it would give considerable weight to the argument, but, in my opinion, a trustee suing in his official name is no such person as has been described. When *A. B.* begins an action in his official name he sues, in my opinion, simply as *A. B.*, and it is immaterial whether he sues as *A. B.* or with the description of trustee; and I find nothing whatever in the 83rd section of the *Bankruptcy Act* of 1869 which interferes with that view. The words of the section, sub-sect. 7, are, that "the trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of —— a bankrupt,' inserting the name of the bankrupt." Now, when the particular person, *A. B.*, ceases to be trustee of the estate, it appears to me that he remains liable on the record until some other person is substituted in his place, and that if another person be named and appointed trustee of the estate he may continue the action in the name of the trustee of the bankrupt, but he is just as much a distinct person as if he continued the action as *C. D.* or as *E. F.* The succession of persons filling the office of trustee and describing themselves as trustees of the estate, does not prevent there being a true succession of persons any more than permission for an earl to sue by his title in the peerage, would enable his successor to continue the action in the same name without being liable for the costs.

Taking that view, it appears to me that when one particular person has been appointed trustee of a bankrupt estate in lieu of another the 3rd rule of Order XVII. applies, and that we have, in the words of that rule, a case of devolution of an estate *lite pendente*. That rule enables the cause or matter to be conducted by the person on whom the estate has devolved, and that being so, the 4th and 5th rules apply, and consequently when one person

succeeds another in the office of trustee and there is pending an action by the first person in the official name as trustee of the estate, the person who succeeds him must obtain an order *ex parte* substituting himself in the place of the original plaintiff, and having obtained that order *ex parte* he must, under rule 5, serve that on the other parties to the litigation. That appears to displace the argument addressed to us, and I think the appeal must be dismissed with the usual result, namely, with costs.

Solicitors for Plaintiff: *Harper & Battcock.*

Solicitors for Defendants: *Newman, Stretton, & Hilliard; Snell, Son, & Greenip.*

M. W.

BORNEMAN *v.* WILSON.

[1884 B. 3802.]

Trustee in Bankruptcy—Adoption by Trustee of Bankrupt's Defence—Costs.

An interlocutory order for an injunction and receiver having been made against the Defendants in an action, they gave notice of appeal, and shortly afterwards became bankrupt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to the Plaintiff that he should not proceed with the appeal. Shortly after this the trustee entered an appearance and called for a statement of claim. He declined to undertake to pay the costs of the appeal incurred by the Plaintiff before the notice that the appeal would not be proceeded with, and the appeal came on that the question as to the costs might be decided:—

Held, that the appeal must be dismissed with costs to be paid by the trustee, for that having adopted the defence of the bankrupts he had placed himself in their position as to the whole of the action, and could not reject part of the proceedings in it.

THIS action was commenced on the 1st of August, 1884, against the defendants *W. Wilson* and *W. Wilson*, junior, and claimed an account of all receipts and payments of the Defendants on account of the Plaintiff, an account of all dealings and transactions by the Defendants as the agents of the Plaintiff, a receiver of all silk and other goods belonging to the Plaintiff in the possession, custody or power of the Defendants, and an injunction to restrain the Defendants from selling, parting with, or otherwise dealing with any goods in their possession belonging to the Plaintiff.

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On the 7th of August, Vice-Chancellor *Bacon* made an order granting an injunction and appointing a receiver, and on the same day the Defendants gave notice of appeal from this order.

On the 4th of September a receiving order in bankruptcy was made against the Defendants, and on the 7th of October *Joseph Andrews* was appointed trustee of their estate.

On the 18th of October an order was made on the application of the Plaintiff that the action and the proceedings therein should be carried on against *Andrews* as Defendant in like manner as they might have been carried on against the *Wilsons* if they had not become bankrupts.

On the 31st of October the solicitors of the trustee gave notice to the Plaintiff's solicitor that it was not the intention of the trustees to proceed with the appeal. On the 5th of November they wrote to the Plaintiff's solicitor for the loan of the original order of the 18th of October, that they might enter an appearance. They went on to ask whether it was the intention of the Plaintiff on the hearing of the appeal to ask for costs against the trustee, as if so, they must instruct counsel to appear on his behalf.

The trustee immediately after this entered an appearance, and called for a statement of claim.

On the 8th of November the Plaintiff's solicitor wrote to the trustee's solicitors that as the trustee had adopted the action, no distinction could be drawn between one motion and another, and the trustee could only be treated as an ordinary defendant. That if, therefore, he (the Plaintiff's solicitor) received on Monday the 10th a letter stating that the trustee was prepared to pay the costs personally of the appeal motion, he would give such instructions to counsel as would prevent any further costs being incurred with regard to the motion. He added that all the costs of the appeal were incurred before receiving the notice of the 31st of October.

No undertaking having been given by the trustee, the appeal came into the paper on the 14th of November.

Herbert Reed, for the trustee:—

The appeal is abandoned and must be dismissed, but I contend that the trustee ought not to be held personally liable for the costs, there ought only to be a right of proof for them, or a

most an order for payment of them out of the estate of the Defendants. It is not the practice to make a trustee in bankruptcy personally pay the costs incurred before he became a party of a proceeding which he abandoned as soon as he could: *Barter* v. *Dubeux* (1).

Millar, Q.C., and *Brooke*, *contrà*:—

If a trustee in bankruptcy objects to being a party, his course is to apply to discharge the order directing the action to be carried on against him, as was done in *Barter* v. *Dubeux*. If he adopts the action he must be liable to costs like any other defendant: *Watson* v. *Holliday* (2), and he must take the action as he finds it, he cannot except a part of the proceedings.

Herbert Reed, in reply.

BOWEN, L.J.:—

The appeal must be dismissed with costs to be paid by the trustee. If a trustee in bankruptcy who finds an action pending to which the bankrupt is a party, elects to go on with it, he must take it as he finds it. He cannot adopt part of the action and leave out the rest. Here before the bankruptcy the bankrupt had given notice of appeal, and the trustee having (by appearing and calling for a statement of claim) adopted the defence, must be taken also to have adopted the notice of appeal.

FRY, L.J.:—

I am of the same opinion. If a trustee in bankruptcy elects to defend an action which is pending against the bankrupt, he takes the action as it stands. He puts himself into the place of the bankrupt as regards the action, and cannot take one part of it and reject another.

Solicitor for Plaintiff: *A. G. Ditton.*

Solicitors for Trustee: *Hindson Miller & Vernon.*

(1) 7 Q. B. D. 413. (2) 31 W. R. 536.

H. C. J.

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Oct. 27, 31.

ASHBURY *v.* WATSON.

[1883 A. 1163.]

Limited Company—Memorandum of Association, Provisions of—Preference and Ordinary Shares—Subsequent Special Resolutions acted upon for ten years, altering the Appropriation of Revenue, invalid—Rights of Shareholders under original Contract.

The memorandum of association of a company incorporated under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), stated that a portion of the shares were to have a right of receiving a dividend by preference to the other shares, and that the preference shares should have a right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and to one-fifth of the remainder of the net revenue, after a deduction of a sum sufficient for paying 7 per cent. per annum on the ordinary shares; and also that those shares should have a right to the rest of the dividend whatever it might be, up to 7 per cent. after payment of 7 per cent. to the preference shares, and to four-fifths of the remainder of the net revenue, after deduction of a sum sufficient to pay the dividends to the preference and ordinary shares.

The directors applied the profits of the company in substantial accordance with the provisions in the articles of association till November, 1872, when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and which provided for the redemption of shares out of the surplus profits, and they were acted upon till July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association, was restored:—

Held, that the resolutions of 1872 were not valid; that no resolution of the company, special or otherwise, could alter the contract made between the company and all the shareholders, and that the revenue of the company available for dividend must be applied in the manner originally prescribed by the memorandum of association.

Held, also, that the receipt of dividends on the footing of the resolutions of 1872, might prevent any shareholder who had received them from asserting a claim against the company for any larger payment during the period of such receipts, but that could not amount to the ratification of an implied contract that the dividends on those shares should always be paid on the same footing.

SPECIAL CASE, stated by consent, for the opinion of the Court, pursuant to the Rules of the Supreme Court, 1883, Order XXXIV.

The case stated as follows:—

"The Plaintiff, *James Ashbury*, sued on behalf of himself and all

other holders of preference shares in the Defendant company—the *Smyrna and Cassaba Railway Company, Limited*—except those who were Defendants to the action.

"The company was incorporated in 1864, under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), for the purpose of making, managing, and working a railway from *Smyrna* to *Cassaba*, in *Asia Minor*, in conformity with a concession in the memorandum of association, and for other objects specified therein. By the said memorandum of association the capital of the company was to be £800,000, divided into 40,000 shares of £20 each. A portion of the shares, not exceeding 14,000, were to have the right of receiving a dividend by preference, and priority over the other 26,000 shares, and the memorandum expressly provided that those shares should have right to a dividend of 7 per cent. per annum upon the amount paid up by preference and in priority over the ordinary shares, and to one-fifth of the remainder of the net-revenue after the deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares; and also that those shares should have right to the rest of the dividend, whatever it might be, up to £7 per cent. per annum, upon the amount paid up after the payment of the said dividend of 7 per cent. to the preference shares, and to four-fifths of the remainder of the net revenue after deduction of a sum sufficient to pay the above mentioned dividends to the preference and ordinary shares. As from the incorporation of the company until the passing of special resolutions on the 26th of November, 1872, the profits of the company were applied in substantial accordance with the provisions above-mentioned in the articles of association, and none of the members of the company raised any objection to such application. The resolutions of November, 1872, ten in number, altered the priorities and payments of the net revenue as between the preference and ordinary shareholders; and provided for the redemption of preference shares out of the surplus profits, and they were acted upon until the 9th of July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association was restored.

"Prior to the meeting of the company on the 9th of July, 1883,

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the solicitor for the Plaintiff and on his behalf gave notice to the directors and secretary of the company that the proposed resolutions were *ultrà vires* of the company, and that he protested against the passing thereof, and required the company and the directors not to act upon it. On the 25th of July, 1883, another general meeting was held, and the resolution of the 9th of July was confirmed, though a further letter protesting against it was handed to the chairman and read at the meeting, from the Plaintiff's solicitor.

"The Plaintiff was entitled to 1270 fully paid-up preference shares of £20 each. He acquired them prior to 1867. It was stated that the application of profits according to the resolution of 1883 would be less beneficial to the holders of preference shares than the application of them according to the resolutions of 1872, and in particular if the profits were applied in accordance with the resolution of 1883 the holders of preference shares would not get the benefit of the provisions for the redemption thereof contained in the resolutions of 1872. The company had in its hands moneys which if applied in accordance with the resolutions of 1872 would be applicable to the redemption of debentures or preference shares; but under the new resolution of 1883 this sum was applicable to the payment of dividends at the rate of 7 per cent. per annum on the preference and ordinary shares, and in the division of the residue between the preference and ordinary shares in the proportion of one-fifth and four-fifths respectively, and no part thereof would be applicable to the redemption of preference shares.

"The questions for the opinion of the Court were, whether the net revenue of the company available for dividend ought in future to be applied in the manner originally prescribed by the memorandum of the association of the company, either by reason of any illegality or invalidity in the terms of the original articles of association or the resolutions of 1872 prescribing a departure from such mode of application, or by reason of the new resolutions. If not, whether such net revenue ought to be applied in the manner prescribed by the resolutions of 1872, or how and in what other manner the same ought to be applied, whether the certificates ought to be issued in respect of the said shares, ordinary and pre-

ference, which had been redeemed or acquired by the company, or in respect of any of them, or what ought to be done in respect thereof, and how the costs of the action and special case ought to be borne."

There was nothing in the special case to shew that all the shareholders, whether ordinary or preference, agreed, but there was a statement that none of the members of the company raised any objection to the special resolutions of 1872.

Robinson, Q.C., and *F. B. Palmer*, for the Plaintiff: —

The special case has been agreed upon for the purpose of taking the opinion of the Court whether the net revenue of the company can be applied to the redemption of preference shares, or be divided amongst the shareholders generally after the rate of 7 per cent. per annum, the directors having proposed, acting under the resolutions of 1883, to take away from the Plaintiff, and other preference shareholders, a proportion of the revenue which up to 1883 was made applicable to the redemption of such shares. The ordinary shareholders no doubt agreed to the resolution of 1883, but the preference shareholders did not. It was competent to the company to alter the memorandum of association by a properly convened meeting, provided the alteration was not of one of the five essential matters stated in the memorandum, as required by the 8th section of the Companies Act, 1862. It was not competent to alter any one of them: *Duke's Case* (1). The resolutions of 1872 as to the distribution of the revenue of the company, which was not one of the matters stated in the 8th section as being necessary to be stated in the memorandum, could, with the assent of all the shareholders be passed. Sect. 12 enabled any company to modify the conditions contained in its memorandum of association if authorized to do so by its regulations: *Winstone's Case* (2); *Guinness* v. *Land Corporation of Ireland* (3).

There was nothing in the memorandum which prevented the resolutions of 1872 being passed. Besides, the alterations then made, have had ten years acquiescence. They were alterations which could be acquiesced in by all the members of the company,

(1) 1 Ch. D. 620. (2) 12 Ch. D. 239.
(3) 22 Ch. D. 349.

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and it must be assumed that after such a period of time all did acquiesce. Alterations, if they did not touch any one of the five things mentioned in sect. 8 of the statute, and if not part of the constitution of the company, could be made. It was not incompetent to the company to make them. There was a sufficient ratification by the shareholders, even though the resolutions of 1872 were *ultrà vires*, as they were accepted by the actual or presumed consent of all, and that was shewn by the long period of time which has elapsed, without opposition to them. That was sufficient for the contention that each member of every class of shareholders gave his individual sanction to those resolutions as much as if each had been present at the meetings and had then agreed to them: *Spackman* v. *Evans* (1): *Phosphate of Lime Company* v. *Green* (2); *Hutton* v. *Scarborough Cliff Hotel Company* (3).

Davey, Q.C., and *W. Phipson Beale*, for the Defendants:—

The resolutions of 1872 were alterations in the constitution of the company. They were against the plain words of the Act of Parliament, and it was not competent to the shareholders to acquiesce in them. Consistently with the provisions in the memorandum of association and articles of the company, looking at the 8th section of the statute of 1862, it is impossible to say that they could be altered. When the parties were settling what the constitution of the company should be, and in what shares the profits should be divided, it was competent to determine that some of the shares should have a preference dividend, and that the rest should not have it. The decision in *Hutton* v. *Scarborough Cliff Hotel Company* bears out that contention, even though it went beyond that which was obligatory. In *Duke's Case* (4) it was sought to put him on the list of contributories for a double number of shares, because after his subscription for fifty shares there was an agreement between himself and the company to divide them into twenty-five A or preference, and twenty-five B or ordinary shares. There was no question in that case of altering the conditions of the memorandum; but the question was, whether

(1) Law Rep. 3 H. L. 171.
(2) Ibid. 7 C. P. 43.
(3) 2 Dr. & Sm. 514; 4 D. J. & S. 672.
(4) 1 Ch. D. 620.

he could take a particular class of shares, and it was held that he could do so. The decision in that and the cases of *Winstone* (1), *Guinness* v. *Land Corporation of Ireland* (2), and *Ashbury Railway Carriage and Iron Company* v. *Riche* (3) are opposed to the Plaintiff's contention. It is submitted that the resolutions of 1872 were *ultrà vires;* that there could not be any acquiescence in an alteration of part of the constitution, which could not be altered, and that the Plaintiff's case fails, as the resolution of 1883 was either good or unnecessary.

Robinson, in reply, referred to *Ashton Vale Iron Company* v. *Abbot* (4); *Harrison* v. *Mexican Railway Company* (5).

Oct. 31. KAY, J.:—

I reserved my judgment in this case because some of the questions argued seem to me to be of considerable general importance. The short facts are these:—[His Lordship having stated them, continued:—] The question is how the revenue is now to be dealt with as between the preference and ordinary shareholders. The Plaintiff contends that notwithstanding the resolution of 1883 it should be disposed of according to the resolutions of 1872, and the first consideration is whether those resolutions were valid. The peculiarity of the Plaintiff's case is, that he must agree with the Defendants that the resolutions were not valid, this being necessary to his argument, for if they were valid, then the resolution of 1883, which restored the original state of things, was also valid. But the Plaintiff insists that the resolutions of 1872, although invalid, were not so *ultrà vires* that they could not be ratified, and that they have in fact been ratified by the express or implied assent of all the shareholders, and that the resolution of 1883 was equally invalid, and not having been so ratified is inoperative.

In the first place, I have to determine whether the resolutions of 1872 could be so confirmed. If they were like the transaction in *Ashbury Railway Carriage and Iron Company* v. *Riche*, entirely *ultrà vires* of the company in general meeting, then it is

(1) 12 Ch. D. 239.
(2) 22 Ch. D. 349.
(3) Law Rep. 7 H. L. 653.
(4) W. N. 1876, p. 119.
(5) Law Rep. 19 Eq. 358.

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admitted, as was decided in that case, that if all the shareholders were *sui juris* and expressly agreed to confirm them they could not do so. But it is said that this was not the case, for although they purported to alter certain provisions in the memorandum of association, yet those provisions were not mentioned in the 8th section of the *Companies Act*, 1862, and therefore need not have been put into the memorandum, and accordingly it is argued that the alteration of them is not *ultrà vires* in that sense. But, as I understand the decision of the House of Lords, the memorandum of association is the charter of the company, and any provisions therein which are an essential part of the constitution of the company cannot be altered in any manner, and unless I am bound by equal authority to hold otherwise, it seems to me that the provisions in this memorandum come within that rule.

The cases relied upon in support of the contrary proposition are, first, *Duke's Case* (1), which decided that where a person had signed the memorandum for fifty preference shares he might satisfy the obligation he had incurred to the company by taking twenty-five preference shares and twenty-five ordinary shares, because it was not necessary that he should describe in the memorandum the kind of shares he thereby agreed to take but only the number; and, therefore, as to the kind of shares the memorandum was not irrevocable. Obviously that has nothing to do with the constitution of the company but only with the contract with that particular shareholder. Another case cited was *Winstone's Case* (2), where the memorandum of an unlimited assurance company provided that the capital should be £500,000, divisible into 50,000 shares of £10 each. The articles provided that the company should consist of two classes of members, shareholders and assurance members, and it was argued that this was inconsistent with the memorandum, but the learned Judge held (3), that this was not so, because the memorandum was totally silent as to who the members were to be. It is true that he went on to say that he was not convinced that everything in the memorandum was immutable where it embodied particulars not required by the statute, and he referred to the language of the judgment in *Duke's Case*, but he neither decided nor said that if the memo-

(1) 1 Ch. D. 620. (2) 12 Ch. D. 239. (3) 12 Ch. D. 250.

randum contained provisions as to the constitution of the company which the Act of Parliament did not require to be put there, that such provisions could afterwards be altered. In *Hutton* v. *Scarborough Cliff Hotel Company* (1), where the memorandum declared the share capital to be £120,000, divided into 12,000 shares of £10 each, it was held that the company could not by a special resolution authorize the issue of the unallotted portion of the capital with a preference dividend. The Lord Chancellor rested his judgment mainly upon the ground that this would in effect be an alteration of the memorandum, which must be taken to mean that the shareholders were to have equal rights. Does it not follow from this decision that if the memorandum expressly defined the rights of the shareholders in respect of dividends that is a thing which the company have no power to alter? I do not find any decision or dictum which rightly understood conflicts with this view.

This would be sufficient to dispose of the matter, but even if this part of the Plaintiff's argument could be accepted, I think his case fails for other reasons. It is obvious that when shares have been issued on the faith of a memorandum like this, no resolution of the company, special or otherwise, can alter the contract between the company and all the shareholders thereof. Such a resolution does not amount to a new contract by every shareholder, even if it were possible for a shareholder by any contract to alter the nature of his shares as against every subsequent holder of them. It may be that the receipt of dividends on the footing of the resolutions of 1872 would prevent any shareholder who had received such dividends from asserting a claim against the company for any larger payment during the period of such receipt, but how can that amount to the ratification of an implied contract that the dividends on those shares shall always be paid on the same footing? First of all, how is such a contract to be implied? Those who passed the resolutions of 1872 must be taken to have known that they could at any time be altered by other special resolutions, therefore the implied contract could not be larger than this; namely, that dividends should be accepted on the shares upon the footing of

(1) 2 Dr. & Sm. 514; 4 D. J. & S. 672.

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the resolutions of 1872, until altered by some further resolution. Upon the whole I am of opinion that the Plaintiff's contention entirely fails, and that the questions must be answered by saying that the net revenue of the company available for dividend ought in future to be applied in the manner originally prescribed by the memorandum of association; that the surplus certificates ought not to be issued, and that the costs of the action and special case ought to be borne by the funds of the company.

Solicitors: *Arthur T. Hewitt; Bircham & Co.*

T. F. M.

In re NACUPAI GOLD MINING COMPANY.

CHITTY, J.

1884

Nov. 1.

Winding-up—Creditor's Petition—Dismissal of Petition on Application of Petitioner—Costs—Shareholders and Creditors appearing to consent.

Where a winding-up petition is dismissed on the application of the petitioner, shareholders and creditors appearing either to oppose or support the petition are entitled to their costs.

In re Jablochkoff Electric Light and Power Company (1) distinguished.

IN this case a petition for winding up the company had been presented by a creditor.

Upon the petition being called on, counsel for the petitioner stated that the petitioner desired to have his petition dismissed.

Whitehorne, Q.C., and *Ribton*, for the petition.

Quin, for the company, assented to this course being taken.

G. Henderson, for shareholders supporting the petition, objected to the dismissal or withdrawal of the petition except upon the terms of their costs being paid by the petitioner.

Whitehorne:—Under the General Orders of November, 1862, Sch. III., Form 1, the advertisement of the petition is addressed only to creditors who intend to oppose the winding-up order. Shareholders who appear and support the petition are not entitled to their costs: *In re Jablochkoff Electric Light and Power Company.*

CHITTY, J.:—

I am quite clear upon the point. It would be most unfair to shareholders who come here in consequence of the advertisement to support the petition to tell them they are not to have their costs. To my mind they are clearly entitled to their costs. The case referred to by Mr. *Whitehorne* was different from this, for there it appears that the shareholders who had intended to

(1) Weekly Notes, 1883, p. 189.

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support the petition consented to its withdrawal or dismissal, but in this case they do not consent except on the terms of their costs being paid.

Solicitors: *E. Lee; Ashurst, Morris, Crisp & Co.; Foss & Ledsam.*

G. M.

CHITTY, J. 1884 *Nov.* 3, 4.

BUTLER *v.* BUTLER.

[1883 B. 3736.]

Will—"Real estates wheresoever situate"—Personal Estate—Leaseholds for Years—Wills Act (1 *Vict. c.* 26), *s.* 26 [*Revised Ed. Statutes, vol. viii., p.* 35].

A testator by his will, dated in 1870, declared that his trustees should stand possessed of and interested in the annual income and proceeds of his real and personal estate in trust to pay an annuity to his wife, and after her decease he declared and directed that his trustees should stand possessed of and interested in his real and personal estate upon the trusts and for the intents and purposes following, that is to say, "as to my real estates wheresoever situate (the *Victoria Park Cemetery* in the parish of *St. Matthew, Bethnal Green*, excepted)" in trust to pay the annual rents and proceeds thereof to two children as therein mentioned, "and as to my freehold estate called the *Victoria Park Cemetery*, and my personal estate wheresoever situated, upon trust to pay the dividends, interest and annual proceeds thereof," to his five daughters in equal proportions.

The personal estate comprised certain leaseholds for years.

Held, that according to the true construction of the 26th section of the *Wills Act* (1 Vict. c. 26) the leaseholds for years did not pass under the gift of the real estates.

Wilson v. *Eden* (1) discussed; *Turner* v. *Turner* (2) and *Gully* v. *Davis* (3) discussed and distinguished.

SPECIAL CASE.

Charles Salisbury Butler by his will, dated the 5th of April, 1870, declared that his trustees should stand possessed of and interested in the annual income and proceeds of his real and personal estate in trust to pay his wife the sum of £3000 annually during her life, and also upon trust to pay to his son *John* £1000 per annum, and to each of his five daughters £700

(1) 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.
(2) 21 L. J. (Ch.) 843.
(3) Law Rep. 10 Eq. 562.

per annum, and that after the decease of his wife such annuities should cease, and instead thereof he declared and directed that his trustees should stand seised and possessed of and interested in his real and personal estate so devised and bequeathed to them upon the trusts and for the intents and purposes following, that is to say "as to my real estates wheresoever situate (the *Victoria Park Cemetery* in the parish of *St. Matthew, Bethnal Green* excepted)," in trust to pay three-fifths of the annual rents and proceeds thereof to his son *John*, and the remaining two-fifths thereof to his daughter *Elizabeth*, and after the decease of either his son or daughter in trust for his or her children equally as therein mentioned, and as to all his freehold estate called the *Victoria Park Cemetery* and his personal estate wheresoever situated, all his shares in gas, water and other public companies, his English and foreign stocks, debentures, bonds and securities, policies of assurance and reversionary interests, he directed that his trustees should on the death of his wife stand seised of the same upon trust to pay the dividends, interest and annual produce thereof to his five daughters in equal shares and proportions, and after their respective deaths in trust for their children as therein mentioned.

There were several questions raised on this special case, but the only one calling for a report, was whether the words "my real estates wheresoever situate (the *Victoria Park Cemetery* in the parish of *St. Matthew, Bethnal Green* excepted)," included certain leaseholds for years of which the testator died possessed.

Ince, Q.C., and *Alexander*, for the Plaintiff, in support of the contention that the leaseholds for years passed under the general devise of the real estate:—

Before the passing of the *Wills Act*, where a testator gave freehold estate at a particular place, and it turned out that he had no freehold estate at that place but had leaseholds, the leaseholds passed, and if he had lands in fee and leases for years and devised all his lands and tenements, the fee simple lands only passed and not the leases for years; but if he had no fee simple land the leases for years passed: *Rose* v. *Bartlett* (1); *Day* v.

(1) Cro. Car. 292.

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Trig (1); *Doe* v. *Lord Cranstoun* (2). Now sect. 26 of the *Wills Act* enacts that "a devise of the land of the testator or of the land of the testator in any place . . . . or otherwise described in a general manner, and any other general devise which would describe a . . . . leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the . . . . leasehold estates . . . . to which such description shall extend . . . . as well as freehold estates, unless a contrary intention shall appear by the will."

Before the Act you had to shew, in order that leaseholds should pass under a devise of freeholds, a clear intention to that effect in the will, but since the Act you must shew a clear intention that they are not to pass. In this case there is nothing on the face of the will to shew an intention that the leaseholds for years were not to pass, and we submit that they did pass under the general devise of the real estates.

They referred to *Gully* v. *Davis* (3); *Moase* v. *White* (4); *Wilson* v. *Eden* (5); *Turner* v. *Turner* (6); *Hobson* v. *Blackburn* (7); *Davis* v. *Gibbs* (8); *Jarman* on Wills (9); *Hawkins* on Wills (10).

Whitehorne, Q.C., and *Stirling*, for Defendants in the same interest, referred to *Swift* v. *Swift* (11).

Davey, Q.C., and *Northmore Lawrence*, argued in the same interest, and referred to *Best* v. *Standeven* (12).

Macnaghten, Q.C., and *Wolstenholme*, for other parties in the same interest.

Romer, Q.C., and *Levett*, for others of the Defendants, in support of the contention that the leaseholds did not pass under the gift of "my real estate."

(1) 1 P. Wms. 287.
(2) 7 M. & W. 1.
(3) Law Rep. 10 Eq. 562.
(4) 3 Ch. D. 763.
(5) 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.
(6) 21 L. J. (Ch.) 843.
(7) 1 My. & K. 571.
(8) 3 P. Wms. 26.
(9) 4th Ed. vol. i. p. 672.
(10) Page 33.
(11) 1 D. F. & J. 160, 173.
(12) W. N. 1872, p. 44.

The term "real estate" is a technical term which must be limited to its proper and legal meaning, and cannot include leaseholds for years.

Wilson v. *Eden* (1) is an authority in our favour, as it contains a clear expression of Lord *Langdale's* opinion as to what could properly be described by the term "real estate." [They were stopped by the Court.]

Crossley, Q.C., *Everitt*, Q.C., and *Davenport*, for Defendants in the same interest.

CHITTY, J.:—

This case has been argued at some length, and I gather that a considerable amount of property depends upon it. The counsel for the Plaintiff, and those who support his various arguments, in the result admit that a decision in their favour will involve this extraordinary result—that it will be tantamount to saying that in any will made after the *Wills Act*, where there is a gift of "my real estate" and a gift of personal estate, leaseholds for years will pass under the former gift and not under the latter. Now it is said that I am constrained, in the absence of any authority for that most extraordinary and to me startling proposition, to arrive at that conclusion by virtue of the 26th section of the *Wills Act*. It certainly strikes me as a very extraordinary thing that this argument should be adduced, as far as I am aware, at the Bar for the first time somewhere about half a century after that Act came into operation. But that result, to my mind, is more remarkable, seeing what the 26th section is, and having regard to the general frame of the *Wills Act*. The 26th section is an interpretation section, giving a new canon of construction; and to my mind it would be a most extraordinary thing that an Act of Parliament is to say, in a very cumbersome manner, that a gift of real estate, after the passing of this Act, shall include that which on the face of the Act itself is described as personal estate; that is to say, that the Court is bound by reason of this 26th section to impute to a testator, if he uses what I consider to be a technical term, a meaning different from

(1) 11 Beav. 237.

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that which the Legislature has expressly and for the purposes of the Act imposed upon the term.

The Act defines real estate and it defines personal estate; and in the definition it excludes from the term "real estate" leaseholds and other chattels real, which are included in the definition of personal estate; and I say it would be a striking result if the Legislature having carefully preserved this well-known difference between these two technical terms, "real estate" and "personal estate," should pass a section saying that testators in making their wills after this Act are to be deemed to give away their interests in terms of years, where the gift is of real estate. Now the will which is before me unfortunately has not been well framed. It may be that there has been a slip in this will, and that the testator has not expressed, as by law he must express, his intentions on the face of it. The will, so far as I need state it at present, runs thus. The widow is to be permitted to reside in his residence at *Upper Clapton*, and 48, *Princes Gate*, the latter being a leasehold house. The property at *Upper Clapton* was freehold, with the exception of a small strip of ground running along the site of the main portion of the tenement, and that appears to have been leasehold held for a short term of years, of which about nineteen years remained unexpired at the testator's death. Then the testator declared that his trustees should "stand possessed of and interested in the annual income and proceeds of" (I will now read his words) "my real and personal estate, when and as the same shall be received, in trust to pay" certain annuities which I need not stay to read. Then there comes the declaration and direction which I am now about to read, and which beyond all question are sufficient to shew an intention to pass the testator's real and personal estate to the trustees. He declares and directs that the trustees for the time being (I will read it short) "shall stand seised and possessed of and interested in my real and personal estate so devised and bequeathed to them as aforesaid upon the trusts and for the intents and purposes following." All that comes afterwards is by way of trust. Then he makes a division of that trust estate into two parts, and the first is thus described—"as to my real estates," (the word "estates" being in the plural) "wheresoever situate, the *Victoria Park*

Cemetery excepted." Then there are certain trusts under which the beneficiaries would be entitled to enjoy in specie whatever passed under that main trust. Then follows a trust which relates to the other parts of the testator's property, and he says, "as to my freehold estate called *Victoria Park Cemetery*, and my personal estate wheresoever situate." I need not read the subsequent words. Those words are simply an imperfect enumeration of the particulars of his personal estate, but they have no force or effect in cutting down the general meaning of the term "my personal estate wheresoever situated." They are trusts, expressed in words which on the face of them are not indicative of real estate or of personal estate, to pay dividends, interest, and annual produce, the words "annual produce" being an excellent legal term, with reference to whatever may be produced from freehold estate. Then he charges the proceeds (I am now quoting his words) "of my said freehold cemetery and of my personal estates"—again in the plural. After that there is a power to lease. There is nothing in any of the limitations of the will to indicate whether the leaseholds for years are to pass by the first or the second of the two main portions that I have referred to.

The will specifically gives "my personal estate wheresoever situated," and until I had heard such long arguments at the bar, it never occurred to me to doubt, and I do not think it occurred to any gentleman practising at the bar to doubt, that a leasehold term of years would pass under a gift of personal estate.

I will now go back to the gift as I call it, the main trust before mentioned "as to my real estates wheresoever situate." That is a general gift describing them as the testator's real estates. Now real estate is a term of art, a technical term well understood; and the general principle applied to construe wills is, that if a testator uses a technical term he must be deemed to use the technical term in its technical sense. Apart from the 26th section of the *Wills Act* I have no doubt—I do not think a doubt could really be fairly raised—that the term "real estates" would not include an interest such as the testator had in a term of years. I now turn to the 26th section.

The 26th section consists of two parts. The first part relates to a devise of land, the second part relates to any other general

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devise. The first portion of the section runs—"A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner," Stopping there for a moment, and bearing in mind of course the subsequent words which put a construction upon such a devise as that, I say that the first portion of the 26th section laid down for the Courts a new statutory rule of construction, and it was over-ruling in substance cases of which *Rose* v. *Bartlett* (1) is the leading example, and which were decided to be the law up to the date of the *Wills Act.*

Under that law a devise of the testator's land in a place would not pass his leasehold interest—I use the term "leasehold interest" in reference to a term of years—perhaps it would be better to say a term of years—it would not pass his term of years or a chattel interest which he had in those lands unless the testator had no freehold interest or freehold lands in the place. In that case only the chattel interest would pass.

Then come these other words about which I have heard so much argument—"and any other general devise;" the section does not say "any other general devise of land," it does not say, "any other general devise of real estate," but it is simply "and any other general devise," and the words are, "which would describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates, or any of them, to which such description shall extend."

It appears to me that this second branch was intended to cover certain cases that might not be covered by the first branch, and that I must find in the will, though it is a will where this is a general devise, some description which points sufficiently to a particular thing, to a particular estate. I am satisfied that that is a general explanation of this second branch of the statute, and that the statute did not mean to enact, as it might have done if it had been the intention of the Legislature, in a most compendious form, that any gift of real estate in a will after the passing

(1) Cro. Car. 292.

of this Act shall include a term of years. I am satisfied that that is not the meaning of this section. The second portion of the section is devoted to covering similar cases which cannot be dealt with by the first, and which probably do not fall within that enactment.

Now there is no binding decision, so far as I am aware, on the question that has been raised. The case of *Wilson* v. *Eden* (1) has been referred to on both sides. That is a case which, according to the ultimate decision of the Court, fell within the first branch of the 26th section. There was a gift of land in the will with reference to a particular locality, and the Court of Exchequer and the Court of Queen's Bench decided that the leaseholds passed under that portion of the document. Lord *Langdale*, when the case was before him in the earlier stage of the litigation, considered the effect of the words which came at the end of the devise, namely, "other real estate;" and Lord *Langdale's* opinion appears to have been that those words were explanatory of what had gone before, and shewed that nothing but that which could be properly described by the technical term "real estate" was included in the devise of the lands "in or near *Windlestone*." The Court of Exchequer, in the judgment of the Chief Baron, did not deal with this point. It is dealt with specifically by Lord *Campbell* in his judgment in the Queen's Bench, and he was of opinion, and those who sat with him agreed in the opinion, that the words "other real estate" ought to be read as a distinct devise; and that there they were not sufficient to cut down the statutory meaning that must be imputed to the earlier words, namely, "lands in or near *Windlestone*," within the 26th section. So that case is not a decision on the point which is now before me, but there is a clear statement of Lord *Langdale's* opinion upon the effect of the words "other real estate" (2), and it is plain that he considered that if the gift had been of real estate the term for years would not have passed; and there is not one word to be found in the judgment of the Court of Exchequer or the Court of Queen's Bench dissenting from that conclusion. The Queen's Bench, as I have said, dissented from his conclusion

(1) 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.
(2) 11 Beav. 252.

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as to the effect of those words with reference to the prior gift, and held that those words were insufficient to cut down the gift. But the opinion thus expressed by Lord *Langdale* remains untouched.

Now this technically is not a decision of Lord *Langdale*, because the point did not arise; but it is a strong expression of opinion, and one which, for the reasons I have given, I propose to follow. I think Lord *Langdale's* opinion was right, and though it may not be technically a decision, it comes as near to a decision as can be.

It was thought the point arose and an expression of opinion was given on it, but in the result it did not arise, because there were no other leaseholds in question except the leaseholds at *Windlestone*.

The case before Vice-Chancellor *Parker* of *Turner* v. *Turner* (1) at first sight looks like a decision in favour of the view taken by Mr. *Romer*, but it is not a clear decision on the point, because that was a will before the *Wills Act*, in which the testator gave a general power of appointment to his wife, and she, after the *Wills Act* came into operation, made her will and made a general devise (I only state it so far as necessary for the purpose of explaining the decision) of her real estate; and the question was whether the leasehold term for years passed under that. The Vice-Chancellor held that it did not; but that turned on the 27th section of the Act, which in substance only enacts this, that a general gift of a testator's own real estate shall carry that which it did not carry before—real estate over which he has a power of appointment. That section, of course, must be read with reference to the interpretation clause, and real estate, therefore, in the 27th section cannot be held to mean that which by law and by the Act itself is deemed to be personal estate, namely, a term for years. Whether any further argument might have been addressed to the Vice-Chancellor in that case on the 26th section, I am not concerned to inquire into.

Now it is said the point came before the learned Vice-Chancellor *Malins* in the case of *Gully* v. *Davis* (2), but when the judgment of the Vice-Chancellor in that case is considered, it

(1) 21 L. J. (Ch.) 843. (2) Law Rep. 10 Eq. 562, 563.

will be seen it really has nothing to do with the case at all, because he did not base his decision on the 26th section but on a particular fact, rightly or wrongly I need not say, in that case, which was that the testator himself believed that the property which he had was of a freehold nature, whereas it turned out after his death to be of a leasehold nature, and as he says, "therefore I must consider that inasmuch as he died in the belief that the property was freehold, and having no freehold estate, but only leasehold, he meant to charge that property with the payment of the 12*s.* per week." The case is expressly put by the learned Vice-Chancellor on the testator's belief—a mistaken belief on the point of fact. It is unnecessary for me to say whether I agree with the decision or not. I will make this observation, with great respect to the memory of the Vice-Chancellor—that if he was in error he was under a great temptation to err, seeing the smallness of the amount given—12*s.* a week—and seeing that unless he had come to this conclusion the gift to the housekeeper would have failed altogether.

The case was argued on demurrer, and it may have been that the parties only wanted a decision so as to enable the housekeeper to receive the 12*s.* a week.

That disposes of the authorities except the case of *Moase* v. *White* (1) before Vice-Chancellor *Bacon*. There a material part of the will was a trust as to the real estate "at, in, or near;" and he held that the leaseholds for years passed. There were some other parts of the will which were possibly relied upon as shewing a contrary intention. He had before him a case which did not fall within the express language of the first part of the 26th section, the term being "real estate," and not "lands." But it was an analogous case, it was a gift of real estate "at, in, or near," and it fell within the principle, though not within the words of the first portion of the section. It has no bearing on the case before me, because in substance it is not a general unqualified gift, as I have of the real estate (unqualified because the exception is immaterial) but it was a gift in substance of real estate described in reference to locality.

I believe I have gone through all the authorities bearing

(1) 3 Ch. D. 763.

CHITTY, J. 1884 BUTLER v. BUTLER.

upon the point, and it appears to me that upon this will the leaseholds for years fall within the trust of the personal estate.

Perhaps I may say one word about the plural which has been so much relied upon—"my real estates." Very little reliance is placed upon that. The term "estate" or "estates" is used throughout this will indifferently, and there is no indication of intention on the face of the will to use the term "estate" in the main trust of "my real estate" in any special sense with reference to the property or the lands themselves. Then the 26th section of the *Wills Act*, upon which I have been commenting so much, contains the expression freehold and leasehold estates in the plural.

Solicitors: *R. Bradshaw; Bower, Cotton, & Bower; Phelps, Sidgwick, & Biddle.*

G. M.

In re LAMB'S TRUSTS.

PEARSON, J.

1884
Oct. 25.

Practice—Appointment of new Trustees—Appointment of existing Trustees as sole Trustees in place of themselves and a bankrupt and absconding Trustee—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34 [*Revised Ed. Statutes, vol. x., p.* 990].

It is the settled practice of the Court under the Trustee Acts, when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves and him. And, though the Court will deviate from this rule and make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund.

PETITION.

This was a petition under the *Trustee Acts*, 1850 and 1852, and the *Bankruptcy Act*, 1883.

The petitioners were two of the three trustees appointed by the will of Lady *Lamb*, widow, who died on the 1st of July, 1884, and the petition prayed that *F. S. Parker*, the third trustee, might be removed from being a trustee, and that the petitioners might be appointed sole trustees of the will and a codicil thereto. A vesting order was also asked for. *Parker* had been adjudicated a bankrupt, and had absconded from *England*, and it was not known where he was.

The testatrix by her will, dated the 25th of January, 1881, devised and bequeathed all her real and personal estate (except so far as the same was thereinafter specifically devised or bequeathed) unto and to the use of the three trustees, their heirs, executors, administrators, and assigns, upon trusts for sale and conversion, and to hold the proceeds of sale and conversion upon certain trusts therein mentioned. These trusts were (*inter alia*) to pay a number of pecuniary legacies of large amounts to persons named in the will, and to pay some life annuities. By a codicil dated the 12th of December, 1883, the testatrix directed that the trustees should hold a legacy of £5000 (which she had by her will bequeathed to *Emily Bridges Taylor*, a married woman), and

PEARSON, J. 1884 *In re* LAMB'S TRUSTS.

invest the same in their names, and pay the income thereof to Mrs. *Taylor* during her life, and after her death pay and divide the capital of the investment amongst her children in such shares and manner as she and her husband should by deed appoint, and in default of such appointment to and between her children in equal shares. Neither the will nor the codicil contained any power to appoint new trustees.

The petition was not served on any one.

R. F. Norton, for the petitioners:—

There has been some difference of opinion among the Judges as to whether the Court will under the Trustee Acts simply remove a trustee without appointing another in his place. *Jessel*, M.R., did so in *In re Harford's Trusts* (1). In *In re Aston* (2) he (sitting in the Court of Appeal) withdrew his opinion (though he said that he still thought he was right) because an opposite opinion had been expressed by Lord Justice *Cotton*, in *In re Nash* (3), on the ground that it was desirable that the practice should be uniform. However, in *In re Martyn* (4), a case in which the trustees had nothing to do but to distribute a fund which was immediately divisible, and there was no continuing trust, the Court of Appeal held that the rule laid down in *In re Aston* did not apply, but, one of several trustees having become a lunatic, an order was made vesting the right to deal with the trust fund in the remaining trustees, who were of sound mind. Lord Justice *Cotton* said (5) that where the fund was immediately divisible he did not see any objection to letting the trustees who were of sound mind have it for the purpose of dividing it. The present case, as the continuing trust applies only to a comparatively small part of the fund, falls rather within *In re Martyn* than within *In re Aston*.

PEARSON, J.:—

I agree in the view expressed by Lord Justice *Cotton*, unless you can shew me that under any more recent statute I have power simply to reduce the number of trustees. Sir *G. Jessel*, M.R., in

(1) 13 Ch. D. 135.
(2) 23 Ch. D. 217.
(3) 16 Ch. D. 503.
(4) 26 Ch. D. 745.
(5) 26 Ch. D. 746.

In re Aston (1) assented to the view taken by Lord Justice *Cotton*, and that is now the law of the Court, and it is binding on me. There being a continuing trust in the present case, *In re Martyn* (2) does not apply. You must amend the petition by asking for the appointment of a new trustee in the place of the bankrupt.

Solicitors: *Gordon & Dalbiac.*

W. L. C.

BORTHWICK *v.* RANSFORD.

[1883 B. 3496.]

Practice—Summons—Determination of Questions at issue in Action—Rules of Supreme Court, 1883, *Order* LV. *r.* 10.

Except to the extent to which special provisions are made by the rules, as, for instance, by Order XV., the plaintiff in an action is not entitled to take out a summons for the determination of the questions which are at issue in the action, and which will properly be decided at the trial.

ADJOURNED SUMMONS.

On the 22nd of February, 1881, an agreement was executed between *A. W. Macdougall* of the first part, the several creditors (four in number) of *Macdougall*, whose names and the amounts of their respective debts were specified in a schedule to the agreement, of the second part, and *W. H. Ransford* and *F. W. Snell* (two of the creditors, as trustees on their behalf) of the third part. This agreement provided that certain property of *Macdougall* should be sold, subject to the direction and under the supervision of the trustees: that the proceeds of sale should be paid to or received by the trustees; and that they should apply all moneys coming to their hands by virtue of the agreement in payment of the expenses of and incidental to the agreement, and in payment and discharge of any incumbrances affecting the property and of the scheduled debts, and should hold the surplus (if any) in trust for *Macdougall*. And in consideration of the agreement by *Macdougall* the creditors agreed forthwith to execute a release to him of their respective claims. The release was executed shortly after the execution of the agreement.

(1) 23 Ch. D. 217. (2) 26 Ch. D. 745.

PEARSON, J. 1884 BORTHWICK v. RANSFORD.

This action was commenced on the 28th of June, 1883, by two of the scheduled creditors against the trustees and *Macdougall*, claiming to have the trusts of the agreement administered under the direction of the Court. The Plaintiffs alleged that difficulties had arisen in the administration of the trusts.

The Defendants delivered defences denying that any difficulties had arisen which required that the trusts of the agreement should be administered by the Court.

The Plaintiffs, not having delivered a reply, on the 7th of January, 1884, took out a summons asking that the trusts of the agreement might be ordered to be administered under the direction of the Court, and that it might be ordered that all proper accounts and inquiries should be taken and made.

Cozens-Hardy, Q.C., and *Jason Smith*, for the Plaintiffs :—

But for the discretion given to the Court by rule 10 of Order LV. (1), the Plaintiffs would have been entitled as a matter of course to an order for the administration of the trusts.

[PEARSON, J. I see great difficulty in making an order for the administration of the trusts upon a summons. This is the object of the action, and the right to an order for the administration of the trusts is the question for determination at the trial. If I were to make the order now I should be practically inviting every plaintiff to come and get his action determined upon a summons instead of waiting till the trial.]

It has been decided that rule 10 applies to actions commenced before the Rules of 1883 came into operation : *In re Llewellyn* (2). It, therefore, applies to other summonses than originating summonses under rule 3 of Order LV., for those summonses did not exist before the Rules of 1883. The latter part of rule 10 shews by implication that the questions at issue in an action may be determined upon a summons in the action. Rule 10 cannot be intended to deal with originating summonses under rule 3,

(1) Rule 10 : "It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order."

(2) 25 Ch. D. 66.

for the procedure on such summonses is fully dealt with by rules 3 to 8. Rule 10 applies to summonses which ask for a complete administration of a trust or estate; an originating summons under rule 3 does not ask for that.

PEARSON, J.:—

If your argument is right I do not see how I can escape from this conclusion, that in every case the plaintiff in an action may take out a summons to determine the questions which are at issue in the action, instead of waiting till the trial in the ordinary course. I can conceive nothing more unfortunate than this, and I do not think it was the intention of the Rules. I cannot allow a summons to be taken out for the determination of the questions which are at issue in an action, and which will properly be determined at the trial. You may, however, be entitled to an order for accounts and inquiries under Order XV. I will hear the Respondents' counsel on this point.

Higgins, Q.C., and *Grosvenor Woods*, for the trustees.

Everitt, Q.C., and *Godefroi*, for the debtor.

Ultimately, on the undertaking of the trustees to deliver to the Plaintiffs within a week an account of all their dealings and transactions in relation to the trust property since the date of an account which they had delivered in December, 1882, the further hearing of the summons was adjourned, and was ordered to come on with the trial of the action.

Solicitors for Plaintiffs: *Morten, Cutler, & Co.*.
Solicitors for trustees: *Burn & Berridge.*
Solicitors for debtor: *Valpy, Chaplin, & Peckham.*

W. L. C.

PEARSON, J.
1884
Oct. 28, 29.

In re MONTAGU.
In re WROUGHTON.
MONTAGU *v.* FESTING.

[1883 M. 644.]

Infant—Education—Jurisdiction.

Infants interested in real estate in *England*, whose father was dead, were living in charge of their mother, who was resident out of the jurisdiction, and was one of their testamentary guardians. At the instance of their other two guardians an order was made declaring in what faith they ought to be educated.

THE object of this action was to make the Plaintiffs, two infant children of the late Captain *Montagu*, wards of Court, and to have a scheme for their maintenance and education settled. The Plaintiffs were entitled to certain real property in *England*. Captain *Montagu* had by his will appointed *Henry Blithways Festing* and *Alexander Grant Meek* to be guardians of the Plaintiffs jointly with his wife.

Captain *Montagu* was a member of the Church of *England*, his wife was a Roman Catholic. Messrs. *Festing* and *Meek* were members of the Church of *England*. Mrs. *Montagu*, after the death of her husband, married a Mr. *Curry*, a native of and resident in *Jersey*.

This was a summons on the part of the infant Plaintiffs to have a scheme for their education and maintenance, under which they were to be brought up as Protestants, taken out of the custody of their mother, and placed in the care of a paternal relative in *England*. The only part of the summons that was argued was, in what faith the infants ought to be brought up. On the part of Mrs. *Curry* it was contended that Captain *Montagu* had elected to have his children brought up as Roman Catholics. She made an affidavit in the matter which contained the following clause:—"I object to my children being taken out of my care and custody. All of my children have been brought up together, and are extremely attached to each other and to me; it cannot be for their advantage that they should be separated from their brothers and

sisters and from me. If this honourable Court sees fit I am ready and willing to come and reside in *England*, and make a home for them there and bring them up in every way suitable to their position. My husband is quite willing that I should do this and will aid me in every way in his power, and is in a position to render the children valuable assistance in after life."

Cozens-Hardy, Q.C., and *B. B. Rogers*, for the summons.

Vernon Smith, for Messrs. *Festing* and *Meek*.

Cookson, Q.C., and *Mulligan*, for Mrs. *Curry*:—

If the Court should be of opinion that the father intended the Plaintiffs to be brought up in the Protestant faith it will not make an order to that effect, because the mother who has control over them is resident and domiciled in *Jersey*, and an order on her would be nugatory. The fact that there is property of the infants within the jurisdiction does not make any difference.

Cozens-Hardy, in reply.

PEARSON, J. (after deciding that the Plaintiffs ought to be brought up in accordance with the tenets of the Church of *England*):—

It is urged that because the children are living with their mother in *Jersey*, who has married a native of *Jersey*, therefore any order I can make with regard to the education of these children is merely *brutum fulmen*. I should be very sorry to impute to this lady any intention to set this Court at defiance, more particularly as she has in an affidavit deliberately sworn that she was willing to come to *England* and her husband was willing to aid her in so doing. But whatever that lady is inclined to do, the other guardians are entitled to have the decision of this Court to guide them. It by no means follows because they have not now that they will not hereafter have the control of the children, and they ought to know what it is proper for them to do, and on that ground alone I should have given my judgment in this case. But I am not prepared to say that this judgment will be ineffectual. I think on the other hand that if the lady

PEARSON,J. considers what is for the good of her children, she will, as other mothers in similar cases have done, consider that her duty both to the Court and her children is to do that which the Court says she ought to do, and accordingly I have no hesitation in saying that the children ought to be brought up as Protestants.

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[No order was made as to the custody of the children.]

Solicitors for the Plaintiffs and their English Guardians:—*Wood, Bigg, & Nash*, agents for *Meek & Jackson, Devizes.*

Solicitors for Mrs. *Curry*: *Saunders, Hawksford, Bennett & Co.*

D. P.

PEARSON,J.

1884

Oct. 27, 30.

In re JOHNSON AND TUSTIN.

[1884 J. 680.]

Vendor and Purchaser—Expense of Abstract of Title—Deeds not in Vendor's Possession—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.

Under sect. 3, sub-sect. 6, of the *Conveyancing Act*, 1881, the purchaser on an open contract must bear the expense of procuring and making an abstract of any deed not in the vendor's possession of which he requires an abstract, even though that deed forms part of the forty years title which the vendor is bound to deduce, and he can compel its production.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 17th of January, 1884, an agreement was entered into between *Thomas Johnson* and *C. D. Tustin*, for the purchase by *Tustin* from *Johnson* of a piece of land at *Woking* in *Surrey*, comprising about two acres, for the sum of £1100. The agreement provided that it was to be "subject to the title of the said property being approved by the solicitor of the said *C. D. Tustin*, and if not so approved then the amount of deposit money shall be returned, each party bearing their own costs and charges in the matter as if no sale had been in negotiation." Possession was to be given on completion. The agreement contained no other stipulations.

The abstract of title afterwards furnished by the vendor to the

purchaser commenced with a deed dated the 12th of December, 1860, which was a conveyance of the land comprised in the agreement by the *London Necropolis Company* to a Mrs. *Ritchie*, through whom the vendor derived title.

The purchaser required the vendor to furnish an abstract of a deed dated the 14th of October, 1854, which was a conveyance to the company of the land comprised in the agreement, together with other land. The deed of the 12th of December, 1860, contained a covenant by the company for the production (*inter alia*) of the deed of the 14th of October, 1854, which was retained by them, and the present vendor was entitled to the benefit of this covenant. The vendor furnished an abstract of this deed, but he insisted that, under sub-sect. 6 of sect. 3 of the *Conveyancing Act*, 1881 (1), the purchaser was bound to pay the expense of making the abstract. The purchaser insisted that the vendor ought to bear the expense himself.

This summons was taken out to determine the question.

H. J. Hood, for the purchaser:—

Under sect. 1 of the *Vendor and Purchaser Act*, 1874, the purchaser is, in the absence of any stipulation to the contrary, entitled to a forty years title, and the vendor is bound at his own expense to furnish to the purchaser an abstract of all the deeds and other documents which are necessary to shew that title, and which are in his possession or of which he can compel the

(1) Sect. 3, sub-sect. 6 provides that: "On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of Courts, Court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

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production. In the present case the parcels cannot be identified without the conveyance to the company. The vendor is bound to furnish a perfect abstract. Sub-sect. 6 does not refer to the main abstract of the title, it refers only to subsidiary matters. A thing must exist before it can be verified.

Swinfen Eady, for the vendor:—

The object of sub-sect. 6 was to compel a purchaser in all open contracts to pay for that for which in all well-drawn contracts of sale it had been the practice to provide by a special condition that he should pay.

[PEARSON, J.:—Suppose a vendor had recently bought a lot of a large estate, and had no deed in his possession but the conveyance to himself, but he was entitled to the benefit of covenants for the production of the earlier title deeds; would sub-sect. 6 compel a purchaser from him to pay for an abstract of all the earlier deeds?]

It is meant that a purchaser must pay for an abstract of every document which is not in the vendor's possession. In the case put by the Court the vendor might have in his possession an old abstract, or attested copies of the earlier deeds, from which he could prepare an abstract. But sub-sect. 6 is express that the cost of making an abstract of anything which is not in the vendor's possession must be paid by the purchaser. What is the distinction between the "main" abstract and any other abstract? The vendor is bound to deliver an abstract of every material deed, and the purchaser is not entitled to call for an abstract of anything which is immaterial. If a vendor had no title but that derived from forty years' possession, and the purchaser required a statutory declaration to prove the possession, he must pay for it.

Hood, in reply:—

The purchaser is entitled to an abstract of a forty years' title, and this carries with it the right to have it furnished at the expense of the vendor. There is no case in which a special condition similar to sub-sect. 6 has been construed as compelling a purchaser to pay for an abstract of every deed not in the

vendor's possession. An example of such a condition is to be found in *Davidson's* Conveyancing (1). If land was sold by a remainderman, the title deeds being in the possession of the tenant for life, the purchaser would, if the argument against me is right, have to pay the whole expense of the abstract. So also, if one tenant in common sold his moiety, the deeds being in the possession of the other tenant in common; or if a sale was made by a mortgagor, the deeds being in the mortgagee's possession. A mortgage might even be made for the very purpose of enabling a vendor to say that he had no deeds in his possession, and thus to throw the whole expense of the abstract on the purchaser. Even if the vendor had copies of deeds or abstracts in his possession he could compel the purchaser to pay for an abstract, because he had not the documents themselves in his possession. Sub-sect. 6 can be reasonably construed without going to this extent. Of course if the vendor has not a deed in his possession, and cannot obtain production of it, he is not bound to do that which is impossible. Sub-sect. 6 ought to be construed on the same principle as the old special conditions of sale were construed, and if the meaning is doubtful the Court will lean against the vendor.

Oct. 30. PEARSON, J.:—

This case raises, I believe for the first time, a question upon the construction of sub-sect. 6 of sect. 3 of the *Conveyancing Act*, 1881. [His Lordship read the sub-section.] The question is, whether the expense of making an abstract which is required by the purchaser of a particular deed not in the vendor's possession is to be borne by the purchaser or by the vendor. In order to understand the case properly one must look a little at the abstract which was delivered in the first instance by the vendor to the purchaser. [His Lordship stated the facts, and continued:] Now, looking at the very first deed which is set out in the abstract, the conveyance by the company to Mrs. *Ritchie*, I find that it contains a covenant by the company to produce certain deeds, and the first deed which is mentioned is the deed of the 14th of October, 1854, which is a conveyance to the company not only of the property now sold, but of a considerable quantity of adjoining

(1) 4th Ed. vol. i. p. 609, condition 7.

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land which was then purchased by them. It is said on behalf of the vendor that, inasmuch as that deed was not in the possession of the vendor, and the purchaser required an abstract of it, according to the literal meaning of sub-sect. 6 he must pay the expenses of procuring and making the abstract.

On the other hand, it was argued by Mr. *Hood*, that under the *Vendor and Purchaser Act* of 1874 the purchaser on an open contract, as this contract is, is entitled to have a forty years' title shewn by the vendor, and, being entitled to a forty years' title, he was therefore authorized to say to the vendor, "I am not satisfied with the abstract which you have produced; produce to me a forty years' title, and, if, in order to verify that title when you have stated it, I require an abstract of any deed which is not in your possession, I admit that I must pay you the expense of getting it. But you cannot simply present me with a blank sheet of paper and say, I have no deeds in my possession; I have got covenants for the production of all the title deeds, but the only deed which I have is a deed dated six months ago by which the property was conveyed to me when I purchased it, and if you want abstracts of any other deeds you must pay the expenses of them." No doubt, if you put the case as strongly as I have put it—a vendor having nothing but a conveyance to himself six months before the sale, having no abstracts of any other deeds, having no attested copy in his possession, and calling on the purchaser to pay the expense of obtaining an abstract of the earlier deeds—it appears to afford strong ground for Mr. *Hood's* argument. But I am bound to say that I think the words of the Act are too strong for me to get over. And, on the present occasion at all events, I think there is not much ground for saying that it will work any injustice, because a twenty years' title was shewn, and the very first deed in the abstract contained a covenant for production which shewed the purchaser that the particular deed of which he now requires an abstract was not in the vendor's possession. I think I am bound to adhere to the plain words of the Act, which says that, if the purchaser requires an abstract of a deed which is not in the vendor's possession, he must pay the expense of making it. And I am the more unwilling to depart from that which seems to me to be the literal meaning of the

words, because I cannot help seeing that if I did so I should be embarking on a sea of difficulties. I should have to determine almost every case of the kind, not upon the words of the section, but upon a consideration whether there was anything unreasonable in the purchaser's requisition, a matter more or less of discretion which in many cases it would be impossible for any Judge to decide satisfactorily. Under these circumstances I must decide that the purchaser is bound to pay the expense of procuring the abstract in question.

Solicitors for Purchaser: *Lee & Pembertons.*
Solicitors for Vendor: *Hicklin, Washington, & Pasmore.*

W. L. C.

In re AINSLIE. SWINBURN *v.* AINSLIE.

[1884 A. 504.]

Windfalls—Larch Trees—Real and Personal Estate—Tenant for Life.

At the death of a testator, the owner in fee of larch plantations, a large number of the larch trees had been more or less uprooted by extraordinary gales:—

Held, that trees which might continue to live but could not grow as ordinary trees, belonged to the executors, and trees that would continue to grow, but would have to be cut for the proper cultivation of the plantations, belonged to the tenant for life under the will.

MONTAGUE AINSLIE died on the 1st of February, 1884, entitled in fee to two estates in *Lancashire*, known as the *Grizedale* estate and the *Satterthwaite* estate, which he had devised to trustees for a term of ninety-nine years on trust to manage and cultivate the estates and fell timber and wood thereon, and out of the proceeds of the felling and sale of such timber and wood, if sufficient, and if not, out of the rents and profits thereof, in proportion to the values thereof, pay an annuity of £250 to his son *Montague Mordaunt Ainslie*, during his life, and to pay the surplus to the persons for the time being entitled immediately in reversion to the rents and profits of the respective estates. He

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devised the *Grizedale* estate in remainder to his son, the Rev. *Henry Ainslie*, for life, with remainder to *Ernest Henry Ainslie*, the eldest son of *Henry Ainslie*, in tail. And the testator devised the *Satterthwaite* estate, subject to the term of ninety-nine years, to his son *William George Ainslie* in fee.

During the months of December, 1883, and January, 1884, extraordinary gales had occurred, which blew down and lifted a large number of larch trees on the two estates, which at the date of the death of the testator were either prone or blown out of the perpendicular, and were more or less attached to the ground by a greater or less proportion of their roots.

This was a summons taken out by one of the executors to have it determined whether the trees so blown down belonged to the executors as personal estate of the testator, or whether they passed as part of the inheritance under the devises of the estate, and if the latter, whether the proceeds of such of them as might be cut and severed from the inheritance by the trustees of the term ought to be treated as income or capital.

The following facts were contained in a statement verified by a forester employed on the estate, and also by Mr. *Jones*, a land agent.

There were on the two estates some thirty-three plantations which had been planted at various times from 1835 to 1880. During the months of December, 1883, and January, 1884, within the two months preceding the testator's death, three very violent storms of wind occurred, doing great damage to the larch plantations, especially on the *Grizedale* estate.

No storms causing an equal amount of damage had previously occurred in the district within the memory of man. The number of trees blown down was upwards of 20,000, containing 99,000 cubic feet of timber, in addition to a very large number of trees of less mature growth. The *Grizedale* estate comprises about 2166 acres, of which 850 are arable or meadow, 332 acres coppice, and 984 plantation. The *Satterthwaite* estate consists of about 550 acres, of which 110 are arable or meadow, 83 acres coppice, and 357 plantation. The two estates occupy the whole of *Grizedale* valley, and the hills on either side, and part of the moorland on the hill tops. The bottom of the valley is used for

pasture or arable land, the lower slopes of the hills are planted with coppice, which is periodically cut and made into bobbin wood, hoops and charcoal, and the upper part of the hills and the crests to some extent are planted with larch trees, the land being fit for nothing else, but being valuable for that purpose, and the source of large profit to the estates.

The larch plantations have, in accordance with the usual custom of the district, been cultivated and dealt with as follows. The land having been enclosed and prepared, young larches are planted to about 2500 to an acre. For the first sixteen years the young trees are occasionally pruned, but there is no profit from them or the land on which they are planted. But after that it becomes necessary to thin the trees. For the next five years the thinnings are only fit to be used for railings for fencing-in new plantations and similar purposes. When the trees are about twenty years old, the thinnings become fit for "prop-wood" in coal mines, and there is sufficient room under the trees left for sheep pasturage. In another ten years the trees begin to mature and become fit to be sold as pit-wood for the hematite iron mines in the neighbourhood, and from that time till they are fifty years old, the plantations reach their full value, and are thinned regularly till cleared, when the ground is replanted, and the same course repeated.

The total amount of saleable timber actually blown down is equal to about eight years' thinnings. It will take about two years to clear the plantations of the trees, and meanwhile the land on which they lie cannot be utilized for any purpose. When all trees blown down have been sold and removed the trees blown out of the perpendicular will have to be cut down and sold and removed, and this will take one year more.

Having regard to the number of trees blown down on the estate, none of the plantations should be thinned for some years to come, not at any rate for the next three years, or such time as is required to clear the trees blown down or necessary to be removed, and even if any thinnings could properly be made (having regard to the great quantity of wood blown down in the district and thrown on the markets), the same would not be saleable to any advantage or at a fair price. No income, unless from the

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proceeds of the sale of the trees blown down or necessary to be removed, will therefore accrue from the plantations during the above period, and when the said trees have been removed a considerable part of the plantations will have to be replanted at a considerable outlay for costs of trees, fencing and labour, &c., and will be quite unproductive for many years.

Cookson, Q.C., and *Ribton*, for the executors:—

All trees that have been blown down so far that it is necessary to take them away and sell them will be considered severed from the inheritance and belong to the inheritance.

Cozens-Hardy, Q.C., and *Pauli*, for the tenant for life of the *Grizedale* estate and the owner in fee of the *Satterthwaite* estate:—

The trees are not severed, but will have to be severed for the proper cultivation of the plantations, and therefore will be cut in due course and belong to the tenant for life.

Wolstenholme, for the tenant in tail in remainder of the *Grizedale* estate:—

The trees are not severed and belong to the inheritance where there is such an extraordinary amount of cutting as will have to take place. The proceeds are not properly income, and ought to be invested.

PEARSON, J.:—

I think all trees that are blown down to such an extent that they cannot grow as trees usually grow are severed and belong to the executors. The proceeds of the trees that are simply lifted, and will have to be cut for the sake of allowing the other trees to grow properly and for the proper cultivation of the estate, will belong to the tenant for life. The trees will have to be sold, and if, for instance, two-thirds of them are blown so far out of the perpendicular that they can no longer grow as trees, two-thirds of the sale moneys will belong to the executors and one-third to the tenant for life. It may be left, if the parties are willing, to Mr. *Jones*, as official referee, to say which trees are substantially blown down.

The summons will be restored to the paper after Mr. *Jones* has made his report.

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Solicitors for all Parties: *Mills, Dowson, & Co.*

D. P.

In re WRIGHT'S TRUSTEES AND MARSHALL.

PEARSON, J.
1884
Nov. 12.

[1884 W. 2133.]

Power of Sale—Extinguishment—Disentailing Deed.

An estate was devised to uses to secure certain annuities, and subject thereto in strict settlement, with power for trustees to sell at the request of the tenant for life under the will. The estate was disentailed and resettled (the existing life estate being postponed to certain charges and the powers of the will being expressed to be kept alive):—

Held, that the trustees for sale and the tenant for life could make a good title.

JOHN WRIGHT, late of *Lenton, Nottinghamshire*, died in 1840, having by his will, dated 1835, devised certain lands in *Nottinghamshire* to certain uses for the purpose of raising annuities, with the usual powers of distress and entry for enforcing payment of the annuities, and subject to the annuities and powers to the use of trustees for a term, and subject thereto to the use of the testator's son *Francis Wright* for life, with remainder to the testator's grandson *John Osmaston*, then *John Wright*, for life, with remainder to the first and other sons of the said *John Osmaston* in tail male; and the testator declared it should be lawful for the trustees of his will "at the request in writing of any person who by virtue of this my will shall be tenant for life in possession, or tenant in tail male or in tail in possession of any of the hereditaments and premises hereinbefore devised, or any part or parts thereof respectively, or shall be entitled to the rent and profits of any of the same hereditaments, or any part or parts thereof respectively, and who shall have attained the age of twenty-one years" to sell or exchange all or any part of the devised hereditaments.

In May, 1878, *Francis Wright*, the first tenant for life, having

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died, *John Osmaston* and his eldest son *Francis Osmaston* executed a disentailing deed, by which they granted the estates settled by the will of *John Wright*, the testator, "subject and without prejudice to the uses and estates by the said will and codicils of the said *John Wright* limited, which were prior to the estate in tail male of the said *Francis Osmaston* (other than the uses or estates limited to the said *John Osmaston* during his life) and to the powers annexed to such prior uses and estates or exercisable during the continuance thereof, so far as the same uses or powers were then subsisting or capable of taking effect, and to such charges as were subsisting on the life estates of the said *John Osmaston*," to such uses as *John Osmaston* and *Francis Osmaston* should appoint, and in default of appointment, to the uses of the will.

John and *Francis Osmaston* exercised the power of appointment over part of the premises comprised in the will by way of mortgage for the benefit of *John Osmaston* the tenant for life, and by deed dated the 22nd of June, 1878, they resettled the whole of the premises by appointing "that all the said hereditaments (subject to the said mortgage) should from and after the execution hereof by them, the said *John Osmaston* and *Francis Plumtree Beresford Osmaston*, but subject and without prejudice to the uses and estates hereby limited to the first son of the said *John Osmaston* in tail male (other than the uses and estates limited to the said *John Osmaston* and his assigns for his life), and to the powers annexed to such prior uses and estates or exercisable during the continuance thereof, and subject also, so far as relates to the life estate of the said *John Osmaston* in the hereditaments specified in the first schedule, to these presents" to a mortgage debt, should stand limited to uses in the first place to secure an annuity to *Francis Osmaston*, in the next place to certain trustees for a term and subject thereto "To the use of the said *John Osmaston* and his assigns during his life without impeachment of waste, in restoration and by way of continuance and confirmation of the former life estate of the said *John Osmaston* under or by virtue of the said will and codicil," with remainders over.

The trustees for sale contracted with *Marshall*, the present applicant, for the sale to him of a portion of the settled estate. The purchaser objected to the title on the ground that the power

under which they purported to sell was gone, and took out this summons under the *Vendor and Purchaser Act* to determine whether his objection could be sustained.

Cozens-Hardy, Q.C., and *Ribton*, for the summons :—

The tenant for life and tenant in tail and remainder by disentailing the estate absolutely destroyed the old life estate of such tenant, and it could not be set up again. The new life estate was not a life estate under or by virtue of the will, there was therefore no one to give effect to the power in the trustees by requesting them in writing to exercise it: *Alexander* v. *Mills* (1).

[PEARSON, J.:—In the cases of *Harrison* v. *Round* (2), and *Fazakerly* v. *Ford* (3), shifting clauses were held to be kept alive after a disentail and resettlement; the principle of those cases seems applicable to this.]

Cookson, Q.C., and *Haldane*, for the vendors :—

The disentailing and resettlement here has been carried out in the usual way adopted by conveyancers for the very purpose of keeping alive the old powers: *Davidson* on Conveyancing (4). It is perfectly competent for persons to disentail and to keep alive such powers, the question is whether they intended to do so. The deeds in this case clearly shew such intention: *Tyrrell* v. *Marsh* (5); *Roper* v. *Hallifax* (6); *Earl of Jersey* v. *Deane* (7). It was even held that where there was a disentail and resettlement, the old settlement was so far alive that the original settlor was the "purchaser," to whom heirship was to be traced in case of failure of persons to take under the settlements: *Shelford's* Real Property Statutes (8).

Alexander v. *Mills* merely went to this, that where the request to sell by the tenant for life amounts to a derogation from his own grant, or operates against the interest of his alienee, he will not be allowed to exercise his request without the concurrence of

(1) Law Rep. 6 Ch. 124.
(2) 2 D. M. & G. 190.
(3) 4 Sim. 390.
(4) 3rd Ed., vol. iii., p. 594.
(5) 3 Bing. 31.
(6) 8 Taunt. 845.
(7) 5 B. & A. 569.
(8) 8th Ed., p. 449.

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the alienee, and the same principle has been applied in the case of a bankruptcy: *Simpson* v. *Bathurst* (1).

Cozens-Hardy, in reply.

PEARSON, J., after stating the facts:—

The question that is argued before me is, have or not the trustees a power to sell, or has the effect of the deeds that have been executed been to displace altogether the estate which *John* had under the will and to give him a new estate altogether, so that he has no longer any power to request in writing the trustees to sell, and the trustees have no longer therefore any power to sell.

The question is what estate does *John* take? On the one side it is argued that he takes an entirely new estate, that he now takes an estate under the disentailing deeds and the further deed in exercise of the power of appointment under the disentailing deed, and that the life estate which he had under the will is gone, and that it could not by any possibility be restored or replaced as it was proposed to restore and replace it under the deeds themselves. On the other hand, it is said the deed ought to be construed according to the manifest intention of the parties, and that if the intention of the parties was manifestly not to touch the estates of the will any further than was necessary to introduce the charges that have been introduced upon the property and subject thereto to leave the old estates existing exactly in the same manner in which they existed before those deeds were executed, then *John* has a life estate under the will, and having the life estate which he originally had under the will he is now entitled to request the trustees to sell.

I am of opinion that the latter contention is the right one, and I should regret exceedingly if I found myself compelled to come to a contrary conclusion, because the result would be to fetter parties exceedingly in making those provisions which are constantly called for when a tenant in tail arrives at full age. If it were to be held that it was impossible for the parties so to arrange that for the purpose of making the alterations which are rendered

(1) Law Rep. 5 Ch. 193.

necessary by change of circumstances and lapse of time, that it was impossible for them to do anything which would not destroy the original limitation under the original will or settlement, I think it would be a case in which some intervention even of the Legislature would be required in order to enable parties to deal with property according to the exigencies of human life. To my mind, I am relieved from any doubt on the case by authority of the highest description — I mean the authority of Lord *St. Leonards*, because, to my mind, this very point was in substance raised in the case of *Harrison* v. *Round* (1). The question arose undoubtedly not upon a power of sale, but upon a shifting clause, and arising upon a shifting clause it arose upon a clause which this Court has always been in the habit of construing with the greatest strictness. In that case there was a marriage settlement, and under that marriage settlement there were two estates, *A.* and *B.*; *A.* was limited, subject to the father's and mother's life interest, to the eldest son in tail male; the second estate, *B.*, was limited to the second son in tail male, and then there was a shifting clause to the effect that if the second son should come into possession of the first estate *A.*, the second estate limited to the second son was to go over, and in the lifetime of the father by the death of the eldest son the second son did become entitled in remainder subject to his father's life interest to estate *A.*, and he and his father thereupon by recovery settled that estate, and I will mention presently, from Lord *St. Leonards*' judgment, the manner in which that estate was settled. The shifting clause was as follows: "Provided always, and it is hereby declared and agreed by and between all the said parties hereto, that in case it shall happen that the second, third, or any other younger son or sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten shall become an eldest or only son, and as such shall become entitled to the actual possession or the receipt of the rents and profits of the aforesaid capital messuage called *Copford Hall* and the aforesaid several other hereditaments first hereinbefore limited therewith to the first son of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten, by and under the limitations and provisions

(1) 2 D. M. & G. 190.

PEARSON, J. 1884 *In re* WRIGHT'S TRUSTEES AND MARSHALL.

hereinbefore contained," then the estate would go over. I need not read the rest of the clause. It was only to go over if he became entitled to estate *A.*, "by and under the provisions hereinbefore contained." Then the recovery was executed: "By the recovery deed the father and son conveyed in the way which was at that time usual when deeds of that kind were well prepared, they conveyed to the tenant of the *præcipe* during the joint lives of the father and of the person to whom the conveyance was made, so as to leave in the father a reversion of his life estate; and there was also what was called the £100,000 clause for the purpose of avoiding the conveyance." The recovery so suffered was only of estate *A.* "All this," says Lord *St. Leonards* (1), "shews that as far as regarded the father's estate the parties intended to leave it as far as they could unaffected by the operation of the recovery and the uses declared by the deed: these uses were to the joint appointment of the father and son, and in default of and until such appointment to the same uses to which the premises were previously limited." [That is exactly the form of the disentailing deed here.] "The effect of this was, that, subject to the exercise of the power of appointment by the father and son, the estate remained precisely in the same position as if the recovery had not been suffered; and if no mortgage had been created." A mortgage was created afterwards here. "It is impossible to say that the strict terms of the provisoes in question would not have been answered when the second son after the death of his father came into possession of the *Copford Hall* estate. The recovery did not so alter the estate as to prevent the operation of the proviso, for no rule of law would in such a case prevent the original intention of the parties from having its full effect and operation." Now, I rely entirely upon what Lord *St. Leonards* said there, he having given a great deal of consideration to the case, and beginning his judgment by saying that the case was of considerable difficulty. He tells me that what I have to consider is that what was the intention of the parties was to leave the original estate where it was affected only by such matters as might be introduced, not for the purpose of destroying the life estate, but for the purpose of giving effect to the arrangement

(1) 2 D. M. & G. 200.

which the father and son intended to make: the result was that the life estate would remain. In both deeds here I have the clearest intimation of the intention that the father joined with the son in order to disentail the property and in order to create the charge of £35,000 and the rent-charges which are created for the benefit of the son—the intention of the father and son was to preserve the father's life estate under the will in the first place and in the disentailing deed here, as in the recovery deed there, the estate was limited, subject to the power of appointment, to the same uses that were subsisting under the will. In the second place, upon the creation of the mortgage and rent-charges, the estate was limited to the use of *John* for life in continuance and restoration of his life estate under the will.

I am of opinion, therefore, that the intention of the parties here was only to displace *pro tanto* the life estate, but subject to that to preserve the life estate of *John Osmaston* under the will. I think that has been done, and if it has been done there is no question whatever that he has the right to request the trustees to sell and the trustees have the power of sale, and I must so decide.

Solicitor for Purchaser: *Hood Barrs.*
Solicitor for Vendors: *Henry Fox.*

D. P.

PEARSON, J.

1884

Nov. 15.

In re WARD'S ESTATES.

Railway Company—Purchase of Land—Payment out of Purchase-money—Person "becoming absolutely entitled"—Trustees with Power of Sale—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 69 [*Revised Ed. Statutes, vol. ix., p.* 642].

A share of stock in Court, which represented money paid into Court by a railway company for the purchase of land taken under their statutory powers, had been assigned by the beneficial owner to trustees, on trust for sale and conversion, at the request in writing of herself during her life and afterwards at the discretion of the trustees, and to hold the proceeds on certain trusts:—

Held, that, the settlor joining in the petition, and the company not objecting, the share might be transferred to the trustees as persons "becoming absolutely entitled" within the meaning of sect. 69 of the *Lands Clauses Consolidation Act*, 1845.

PETITION.

This was a petition for the transfer and payment out of Court of some stock and cash, representing money paid into Court by the *Metropolitan Railway Company* for the purchase of three houses taken by them for the purposes of their undertaking.

By the will of *William Ward*, dated the 23rd of March, 1850, the houses were (subject to a prior life estate as to each house) devised to his daughter *Mary Ann Ward* for her life, with remainder to all and every her child and children as tenants in common in fee. Two of the houses were taken by the company in 1867, and the third in 1873, and the purchase-money was in each case paid into Court, and in each case a conveyance to the company was executed by the tenant for life for the time being entitled under the will. The prior tenants for life all died before *Mary Ann Ward*. She died on the 17th of June, 1884. She had only three children, viz., *T. W. Ward*, *Henry Ward*, and *Eleanor Ward*. *Henry Ward* died on the 31st of January, 1877, having by his will given the whole of his property to his wife, *Emma Egerton Ward*, absolutely, and on the 14th of December, 1877, letters of administration to his estate were granted to her. On the 26th of September, 1871, *Eleanor Ward* married *W. H. Collings*. No

settlement was made on the marriage. *T. W. Ward* and Mrs. *Collings* both survived their mother, *Mary Ann Ward*. On the 16th of March, 1878, *Emma Egerton Ward* granted and assigned to trustees the equal undivided third part or share to which she, as universal devisee and legatee of *Henry Ward*, was entitled under the will of *William Ward*, in reversion expectant on the death of *Mary Ann Ward*, in the funds in Court representing the purchase-moneys of the three houses, To hold the same (subject to the several life estates subsisting therein and subject to some mortgages) upon trust that the trustees or trustee for the time being of the deed should, when and as requested in writing by *Emma Egerton Ward* during her life, and afterwards as and when the trustees should in their absolute discretion think proper, sell and convert the same, or such part thereof as should not consist of money, and should hold the proceeds of sale and conversion, and the trust premises until sale and conversion, upon the trusts therein mentioned. On the 24th of January, 1874, a post-nuptial settlement of the one-third share of Mrs. *Collings* under the will of *William Ward* was executed, a power of sale being given to the trustees of the settlement similar in its terms to the trust for sale contained in the settlement of the 16th of March, 1878.

The petition was presented by *T. W. Ward;* the trustees of the settlements of March, 1878, and January, 1874; the executors of *Mary Ann Ward;* and the mortgagee of the share of *Emma Egerton Ward*. Mr. and Mrs. *Collings* and *Emma Egerton Ward* were afterwards added as Petitioners.

The petition prayed that the funds in Court might be divided into three equal parts, and that one part might be transferred and paid to *T. W. Ward*, another part to the trustees of *Emma Egerton Ward*, and the third part to the trustees of Mrs. *Collings*.

S. Dickinson, for the Petitioners:—

The only question is whether the trustees of the settlements of the 16th of March 1878, and the 24th of January, 1874, are persons "becoming absolutely entitled" within the meaning of sect. 69 of the *Lands Clauses Consolidation Act*, 1845. In *In re*

PEARSON, J. 1884 *In re* WARD'S ESTATES.

Hobson's Trusts (1) it was held by the Court of Appeal that trustees with power of sale of a share of real estate taken by a railway company were persons "becoming absolutely entitled" to the corresponding share of the purchase-money in Court, and that the Court would not inquire into the trusts. In that case the trustees appear to have had an absolute power of sale; here the trust is to sell at the request in writing of another person. But, as that person joins in the petition, and the company raise no objection, I submit that the transfer may be made to the trustees.

C. B. McLaren, for the railway company, consented.

PEARSON, J.:—

As the company do not object I think I may make the order asked for.

Solicitors for Petitioners: *Garrard, James, & Wolfe.*
Solicitors for Company: *Fowler & Perks.*

(1) 7 Ch. D. 708.

W. L. C.

SAYERS *v.* COLLYER.

C. A. 1884 Nov. 6, 8.

[1882 S. 1004.]

Covenant — Mutual Restrictive Covenants — Building Estate — Alteration of Character of Estate—Acquiescence—Lord Cairns' Act (21 & 22 *Vict. c.* 27) [*Revised Ed. Statutes, vol. xiii., p.* 268].

A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant and for damages. The Plaintiff had known for three years before the action was commenced that the Defendant was using his house as a beershop, and had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, and that some of the houses near the Plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents:—

Held, that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the Plaintiff, as the change was not caused by his conduct; but that the Plaintiff had lost the right to enforce his covenant either by injunction or damages, through his acquiescence in the proceedings of the Defendant.

Duke of Bedford v. *Trustees of the British Museum* (1) explained.

Lord Cairns' Act (21 & 22 Vict. c. 27) is applicable to cases where the damage sustained by the Plaintiff is only nominal, as well as to cases where he is entitled to substantial damages.

The repeal of *Lord Cairns' Act* by 46 & 47 Vict. c. 49 has not affected the jurisdiction of the Court.

Per Fry, L.J.:—An amount of acquiescence on the part of the Plaintiff which would not be sufficient to bar his action, may be sufficient to induce the Court to give damages instead of an injunction.

THIS was an appeal from a judgment of Mr. Justice *Pearson* (2).

The facts, which are fully stated in the previous report, were shortly as follows:—

The *British Land Company* purchased an estate at *Leytonstone*, which they laid out in lots for building purposes and sold to different purchasers.

(1) 2 My. & K. 552.

(2) 24 Ch. D. 180.

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By a deed dated the 28th of March, 1877, the company conveyed one of the lots, being No. 440 in a plan therein referred to, to *George Upton* in fee. The deed contained mutual covenants by the vendors and the purchaser that they and their respective heirs and assigns would perform the stipulations specified in the 2nd schedule to the deed.

The schedule contained, among others, the following stipulations:—

"Trades, &c., prohibited.—No building shall be erected or used as a shop, workshop, warehouse or factory, nor shall any trade or manufacture be carried on, nor any operative machinery be fixed or placed, nor any noxious or offensive process or deposit be carried on or made upon any lot."

"Mutual covenants.—Each conveyance shall contain covenants by the vendor and purchaser to observe the above stipulations. The covenant of the purchaser (in respect of the land conveyed) shall be with the vendor and the other owners of the land to which the stipulations relate, and also as to lots 435 to 445 with the owners of lots 283 to 288 and 308 to 312 on the plan."

By a deed dated the 28th of September, 1877, *Upton* conveyed part of lot 440, on which a house had been built, to the Plaintiff in fee, subject to the restrictive covenants contained in the deed of the 28th of March, 1877. The Plaintiff occupied this house as his private residence.

By a deed dated the 17th of April, 1878, the company conveyed lot 445 to *Leonard Prevost* in fee, subject to covenants and stipulations corresponding to those contained in the deed of March, 1877.

In April, 1879, the Defendant agreed to purchase from *Prevost* lot 445, upon which a house, built to all appearance as a public-house or beershop, had been erected. Before the property was conveyed to him the Defendant had notice of the restrictive covenants, but it was conveyed to him by a deed dated the 18th of April, 1879, without any restrictions whatever.

In May, 1879, the Defendant obtained an "off" license for the sale of beer, and he then opened the house as a beershop and continued to use it as such, obtaining a renewal of his license from year to year.

On the 2nd of March, 1882, the Plaintiff issued the writ in this action, claiming an injunction to restrain the Defendant from so using the house, and from carrying on any other trade therein contrary to the covenants entered into by *Prevost* in the deed of the 17th of April, 1878. The Plaintiff also claimed damages.

The evidence shewed that the Plaintiff became aware of the use of the Defendant's house as a beershop immediately after the Defendant so opened it, and that he had in 1879 told the Defendant's manager that he had no right so to use it; but the Plaintiff took no steps to prevent the Defendant from doing so till he commenced this action. The Plaintiff himself had for some time bought beer at the Defendant's shop. The Plaintiff stated that the reason why he did not take proceedings against the Defendant sooner was that he had mortgaged his own house, and the title deeds were in the possession of the mortgagee, and he did not know that he had any right to enforce the restrictive covenant until after he had in 1881 paid off his mortgage and consulted his solicitors. There was evidence that several of the houses subject to the restrictive covenant had been for about three years occupied as shops; and also that at the time of the trial most of the houses in the row of houses in which the Plaintiff lived were occupied, not each by a single tenant, but each by two families paying weekly rents, the rents paid amounting to 8*s.* or 10*s.* per week for the whole of such house.

Mr. Justice *Pearson* dismissed the action with costs; and from this judgment the Plaintiff appealed.

Everitt, Q.C., and *E. Ford*, for the Appellant:—

The Plaintiff has a right to an injunction to enforce the restrictive covenants. The Plaintiff has a legal right, and the Defendant purchased with notice of the covenants: *Doherty* v. *Allman* (1). The principle laid down in *Duke of Bedford* v. *Trustees of the British Museum* (2) has no application to the present case, for whatever change may have taken place in the character of the neighbourhood was not caused by the Plaintiff's conduct. Nor has there been such acquiescence on the part of the Plaintiff as

(1) 3 App. Cas. 709, 719. (2) 2 My. & K. 552.

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to disentitle him to relief. He did not in any way encourage the Defendant to open the beershop, nor to lay out any money upon it: *Kemp* v. *Sober* (1); *London, Chatham, and Dover Railway Company* v. *Bull* (2); *Willmott* v. *Barber* (3). Mr. Justice *Pearson* held that the Court had a discretion under *Lord Cairns' Act* (21 & 22 Vict. c. 27) to refuse an injunction and to grant damages instead; and then, being of opinion that the Plaintiff had proved no actual damage, he refused relief altogether. But surely *Lord Cairns' Act* was not intended to apply to such a case as this. It can only be applicable to a case where substantial damages are claimed. Here, what we want is a declaration of title, and to that we are entitled, although no substantial damage has been proved. *Lord Cairns' Act* has been repealed since the judgment in the case by the 46 & 47 Vict. c. 49, therefore no question arises under it on the appeal.

Cozens-Hardy, Q.C., and *Farwell*, for the Defendant, were not called on.

BAGGALLAY, L.J., after stating the facts of the case, said:—

A number of cases have been cited in the course of the argument, but they are of very little importance for the decision of this case, except as enunciating the principles on which the Court ought to act, for each case must be determined according to its peculiar circumstances. The authorities establish the principle that there may be such an amount of acquiescence as may bar the right of a covenantee to enforce his covenants. I mean acquiescence as distinguished from delay, for a shorter period is sufficient to bar the enforcement of rights in the case of acquiescence than in a case of mere delay.

The question then here is, whether in the circumstances of the present case there has been such an amount of acquiescence as is sufficient to preclude the Plaintiff from enforcing his covenant. In my opinion the evidence does shew such an amount of acquiescence as bars the Plaintiff from enforcing his rights. The sale of beer by the Defendant began in 1879 only four doors from

(1) 1 Sim. (N.S.) 517. (2) 47 L. T. (N.S.) 413.
(3) 15 Ch. D. 97.

the house where the Plaintiff lived, and went on till the commencement of the action. He was aware of the fact, and during some part of that period the Plaintiff himself bought beer at the Defendant's house. I can hardly imagine a stronger case of acquiescence than this. It was not a public-house in the ordinary sense of the words: the Defendant sold beer to be drunk off the premises; people bought it and took it away to their own houses. Mr. Justice *Pearson* appears to have held that the case fell under the doctrine of *Duke of Bedford* v. *Trustees of the British Museum* (1), the character of the neighbourhood having been changed. But I do not take quite the same view of the case. Within certain limits, no doubt, that authority has an application to the present case, but I do not decide it upon that ground. I prefer to base my decision on the ground of acquiescence on the part of the Plaintiff.

Mr. Justice *Pearson* also thought that in consequence of the change of condition of the neighbourhood he ought not to grant the injunction, but that the Court had a discretion under *Lord Cairns' Act* to grant damages instead of an injunction; and being of opinion that the Plaintiff had sustained no substantial damage he dismissed the action altogether. Various comments have been addressed to us on *Lord Cairns' Act*; and it has been contended that it is not applicable to cases where the damages are nominal only. I cannot accede to that view. If it were so held, the result would follow that if a plaintiff had sustained damage to the extent of £20 the Act would apply, but if he had sustained only nominal damage it would not apply, and the plaintiff would be entitled to an injunction. This is surely inconsistent with the purposes of the Act.

Our attention was called to the fact that *Lord Cairns' Act* had been repealed since the former hearing of this case, being included in the schedules to the *Statute Law Revision and Civil Procedure Act*, 1883 (46 & 47 Vict. c. 49), but that Act contains words preserving the jurisdiction of the Court notwithstanding the repeal. By sect. 5 it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act shall

(1) 2 My. & K. 552.

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not be affected by the repeal. It is not, however, necessary to have recourse to *Lord Cairns' Act*, for it is clear that the Court now has power to give damages as alternative relief. Before *Lord Cairns' Act* was passed a plaintiff who wished to enforce a restrictive covenant had two remedies; he might come into a Court of Equity for an injunction to restrain an infringement of his right, or he might have recourse to a Court of Common Law to obtain damages, and *Lord Cairns' Act* gives the Courts of Equity the power of giving a plaintiff damages by way of alternative relief. But since the *Judicature Acts* each Division of the Court has full power, apart from *Lord Cairns' Act*, to give either an injunction or damages.

I refer to that point only because it was dwelt on in the argument; but the ground of my decision is that there has been such an amount of acquiescence in the present case as to bar the Plaintiff from enforcing his covenant. The appeal must, therefore, be dismissed.

BOWEN, L.J.:—

I agree that the true ground for deciding this case is not the mere fact of an alteration in the proprietary character of the neighbourhood. The case of *Duke of Bedford* v. *Trustees of the British Museum* (1) must not be misunderstood or misapplied. It did not decide that contractual obligations disappeared as circumstances changed; but that a person who is entitled to the benefit of a restrictive covenant may, by his conduct or omissions, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction. It was decided on equitable grounds that in such case there would be an equity against the plaintiff which would bar that particular relief. In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient; because there is no evidence that such alteration was caused by the Plaintiff. But the true ground of our decision is that the Plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way in which he has behaved towards the Defendant.

(1) 2 My. & K. 552.

Mr. Justice *Pearson* dealt with the case under *Lord Cairns' Act.* He held that it was a case in which he ought to refuse an injunction, but had a right under that Act to grant damages instead; and as he assessed the damages at one farthing, he dismissed the action altogether. The counsel for the Appellant complained of this treatment of the case by the learned Judge; they said that the Court elected to treat the case as one of damages, and then gave no damages at all; and they contend that the Act did not apply to such a case as that. But it is obvious that the Act applies with double force to cases where only nominal damages could be given. Otherwise this absurd result would follow, that if a plaintiff is entitled to substantial damages the Court could refuse him an injunction, but if he had no real cause of complaint he would have a right to an injunction. In other words, as his damages decreased to zero, his right to an injunction would correspondingly increase. That is so absurd a proposition that I cannot believe that it was intended by the Legislature. I think, therefore, that Mr Justice *Pearson* was right in treating the case as coming under *Lord Cairns' Act.* I doubted at first, whether he ought not to have given nominal damages and no costs. But my doubt has been removed by the consideration that a plaintiff will not be saved from having his action dismissed with costs unless he has suffered tangible damage, or unless he is justified in bringing his action to ask for a declaration of title, or to try a right. But here the Plaintiff has suffered no material damage, and he has no right to bring an action and ask for a declaration of title against the present Defendant. If he had not behaved to the Defendant as he did, there is no reason why he should not have had his right declared by the Court. But the acquiescence which disentitles him to an injunction also precludes him from obtaining a declaration of title, and makes it a frivolous action. I think, therefore, Mr. Justice *Pearson* was right in dismissing the action.

FRY, L.J.:—

I concur in what has been said on the first question; I agree that the rule in *Duke of Bedford* v. *Trustees of the British Museum* (1) is not applicable to this case. It applies where an

(1) 2 My. & K. 552.

C. A. 1884 SAYERS v. COLLYER. Fry, L.J.

alteration takes place through the acts or permission of the plaintiff, or those under whom he claims, so that his enforcing his covenant becomes unreasonable. But I do not think that it applies to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff. Therefore I think, although we have not heard the Respondent on the point, that the learned Judge was not right in applying the principle of that case to the present.

But I agree that the action must be dismissed on the ground of the acquiescence of the Plaintiff. Acquiescence may either be an entire bar to all relief, or it may be a ground for inducing the Court to act under the powers of *Lord Cairns' Act*. Although I do not differ from what has been said by Lord Justice *Baggallay*, I am inclined to prefer the other ground, and think that this is a case in which the Plaintiff's acquiescence would have induced me to give damages instead of an injunction. It was argued that *Lord Cairns' Act* is not applicable to cases where nominal damages only could be given, but only to cases where the damages are substantial. It would be extraordinary if, as Lord Justice *Bowen* said, the effect of the Act were to be that the right to an injunction increased as the right to damages decreased, and that the right to an injunction became absolute when the damages were zero. In my opinion the Act applies to cases where the damages are merely nominal. And I am clearly of opinion that acquiescence is one of those circumstances which the Court may take into consideration in deciding whether it should give damages or an injunction; and that an amount of acquiescence less than what would be a bar to all remedy, may operate on the discretion of the Court, and induce it to give damages instead of an injunction.

Therefore, without differing from the other Lords Justices, I prefer to rest my decision on that ground.

Solicitors for Plaintiff: *Clapham & Fitch.*

Solicitors for Defendant: *Stokes, Saunders, & Stokes.*

M. W.

HOLGATE *v.* SHUTT.

C. A. 1884 Nov. 14.

[1883. H. 5164.]

Account—Order for Accounts not referring to Settled Accounts.

Under an order directing an account, and not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so.

By the rules of a benefit society it was provided that the accounts should be audited, and that, after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. By statute 10 Geo. 4, c. 56, s. 33, it was directed that the accounts of a society of this description should be audited by two or more members of the society. In December, 1883, an order was made for an account of all moneys received by *S.*, the late secretary. *S.* carried in audited accounts down to October, 1880, and claimed to have them treated as conclusive, while the Plaintiffs claimed to have them disregarded. The Court of Appeal decided (1) that accounts audited and signed according to the rules were *primâ facie* evidence in favour of *S.*, but that the Plaintiffs, in taking the accounts directed by the order, might impeach such audited accounts for fraud. On examination of the audited accounts, it appeared that they had throughout been audited and signed by one person only, who was not a member of the society. *Bacon*, V.-C., made an order expressing his opinion that the accounts had been audited in accordance with the rules, and directing the account under the order of December, 1883, to commence from October, 1880, the date of the last audit:—

Held, on appeal, that the accounts had not been duly audited in accordance with the statute and the rules, and that the order of the Vice-Chancellor must be discharged, but without prejudice to the right of the Defendant to shew that the accounts in question were to be treated as settled accounts on any other ground than that they were audited in accordance with the statute and the rules.

THE Defendant had been the secretary of the *No. 2 King's Arms Hotel Benefit Building Society*. The Plaintiffs were three members of the society suing on behalf of themselves and all other the members except the Defendant. On the 14th of December, 1883, a general account was directed of the moneys and property of the society come to the hands of the Defendant, not saying anything

(1) 27 Ch. D. 111.

C. A. 1884 HOLGATE v. SHUTT.

about settled accounts. In taking the accounts in Chambers the Defendant set up accounts which had been audited, as conclusively verifying his accounts down to October, 1880, the date of the last audit. The Plaintiffs took out a summons asking that in taking the accounts audited accounts might be disregarded. Vice-Chancellor *Bacon* dismissed the summons. The Plaintiffs appealed, and the Court of Appeal dismissed the appeal, prefacing their order with a statement of opinion, that although accounts audited and signed in accordance with rule 7 of the rules of the society were *primâ facie* evidence in favour of the Defendant, it was competent for the Plaintiffs, in taking the accounts directed by the order, to impeach such audited accounts for fraud (1).

The 7th rule provided that the books should be audited every twelve months by auditors appointed by the society and signed by such auditors, but the rules contained no directions as to how the auditors were to be appointed. The statute 10 Geo. 4, c. 56, s. 33, which was applicable to this society, provided: "That the rules of every such society shall provide that the treasurers, trustees, stewards, or other principal officer thereof shall, once in every year at least, prepare or cause to be prepared, a general statement of the funds and effects of or belonging to such society, &c., together with an account of all and every the various sums of money received and expended by or on account of the said society since the publication of the preceding periodical statement; and every such periodical statement shall be attested by two or more members of such society appointed auditors for that purpose, and shall be countersigned by the secretary or clerk of such society."

The 29th rule of the society provided: "that every question, order, matter, or thing, which shall arise or be moved, or discussed, at any of the meetings of the society, shall in all cases (except where the same is by the foregoing rules or any clause herein contained otherwise specially provided for) be determined by a majority in number of the members shall who be present thereat, and the same after being so determined shall be binding and conclusive to all intents and purposes."

The audited accounts which were relied on by the Defendant

(1) 27 Ch. D. 111.

had been audited only by one auditor appointed from time to time by the society—a Mr. *Holden*, who was not a member of the society.

The question was adjourned into Court whether these accounts were to be treated as audited accounts within the rule, and therefore given in evidence for the Defendant. Vice-Chancellor *Bacon* considered that the point had been decided by the Court of Appeal on the former occasion, and that the words in their order, "accounts audited and signed in accordance with rule 7 of the rules of the society," were only descriptive of the particular accounts which were produced. His Lordship made the following order: "The Court is of opinion that the audited accounts of the *No. 2, &c., Society* have been audited in accordance with the rules of the said society, and doth order that the accounts directed by the said order dated the 14th of December, 1883, shall commence after October, 1880, the date of the last audit."

The Plaintiffs appealed, and the appeal was heard on the 14th of November, 1884.

Millar, Q.C., and *Farwell*, for the Appellants:—

The Act 10 Geo. 4, c. 56, s. 33, provides that accounts shall be audited by two or more members of the society appointed for the purpose. Rule 7 does not provide anything as to the appointment of auditors, but it uses the word "auditors" in the plural, and must be taken to refer to the mode of audit directed by the Act. Here the auditing was by one person who was not a member of the society, thus introducing the very danger against which the Act intended to guard, viz., the auditing of the accounts by some person having no interest, and who might be a nominee of the accounting parties. The audit not having been conducted according to the Act and Rules, these are not audited accounts within the meaning of the order of this Court of the 18th of June last, and ought to be disregarded.

[FRY, L.J.:—Neither the Act nor the Rules say that no account except one audited in the prescribed way shall be treated as a settled account.]

That may be, but in that case the Defendant must shew that

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the accounts have been settled so as to be binding on the Plaintiffs.

Marten, Q.C., and *Hamilton Humphreys, contrà* :—

The Plaintiffs knew what the course of practice of the society had been, and if they wanted to have these accounts treated as not being settled they should have made a case for setting them aside. An objection that accounts audited according to the plan which prevailed in the society from the first were not duly audited accounts, ought to have been raised at once. *Begbie* v. *Fenwick* (1) proceeds on this principle. The application on the former occasion referred to specified audited accounts, and we submit that the Vice-Chancellor was right in holding that the words in the order of June last referred to those accounts. The rule in the statute is merely directory, and though the managing body of the society may have incurred penalties for not obeying the statute, still the audited account must be treated as a settled account, there being no words to the contrary in the statute. The 29th rule enables the society to modify its modes of procedure, and an auditing by the direction of a meeting will be good, though not effected by two auditors.

FRY, L.J.:—

I have been asked by my learned brother to give the first judgment. This is an action brought by certain members of a building society on behalf of themselves and all other the members except the Defendant, against the late secretary. On a motion for payment into Court and for a receiver coming before the Court, the parties, with great propriety, agreed that the order should go for an account of all moneys and property of the society come to the hands of the Defendant. Upon taking the accounts in Chambers, certain books were produced which were signed by a Mr. *Holden*, who was alleged to be the auditor of the society, and thereupon the controversy arose as to whether or no those accounts were settled accounts. That question evidently, in the first place, took the form of an allegation on the part of the secretary that those accounts were settled accounts, because

(1) 20 W. R. 67.

they were audited in compliance with the rules of the company. The matter came before this Court upon an appeal from Vice-Chancellor *Bacon*, and this order was made: "The Court being of opinion that though accounts audited and signed in accordance with rule 7 of the rules of the society are primâ facie evidence in favour of the Defendant, it is competent for the Plaintiffs, in taking the accounts directed by the order of the 14th of December, to impeach such accounts for fraud" thereupon dismissed the appeal.

The point now raised before us is whether the accounts in question are or are not accounts audited and signed in accordance with rule 7, so as to bring them within the scope of the declaration made by the Court of Appeal on the former occasion. That appears to me to be a simple inquiry as to the meaning of the rule, and the way in which the accounts have been audited. The society is one regulated by the existing legislation upon building societies, and one of the Acts which regulate such societies is 10 Geo. 4, c. 56. The 33rd section of that Act requires that the rules of every society shall provide for the preparation by certain officers once in every year at least of a general statement of affairs, and then it goes on to say that such periodical statement shall be attested by two or more members of such society appointed auditors for that purpose, and shall be countersigned by the secretary or clerk. The rules of this particular society contain no express provision for the appointment of auditors, and therefore it is evident that the auditors referred to in the rules, when auditors are spoken of, must be the auditors required to be appointed by the Acts which regulate building societies. The 7th rule provides that "The books of the secretary, vice-president, and treasurer shall be audited every twelve calendar months by auditors appointed by the society, and signed by such auditors to denote their accuracy in the secretary's book." It appears to me to be plain that the auditors referred to in that passage must be the auditors pointed out by the statute of 10 Geo. 4, that is to say, there must be two auditors for every yearly audit, and those auditors must be members of the society.

Now in the present case the audit was for years made by a single person and that person was not a member of the society.

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It follows in my judgment that the audit has not been an audit in accordance with rule 7 or with any other rules of the society. It has been suggested that the general power given to the society of regulating their affairs by a majority covers this case. In my view it cannot override the express provisions of rule 7 and the provisions of the Act of Parliament. I think therefore that the Respondent is wrong in his contention that the accounts in question have been audited in accordance with the rules of the society, and I therefore think that the order of the Vice-Chancellor, declaring his opinion that they have been so audited, cannot stand.

It has been urged upon us that this inquiry is precluded by the form of the original order directing the account, for that if the Plaintiffs desired to impeach the accounts they were bound to make a case for so doing at the hearing of the motion of the 14th of December, 1883, and ought at any rate to have obtained liberty to impeach settled accounts. In my judgment that argument comes too late, because the very point was decided by this Court when the case came before it in June last (1). Lord Justice *Lindley* then said: "We must take care not to introduce rules which would preclude parties from impeaching a settled account on the ground of fraud, and at the same time we must not treat settled accounts as waste paper." The result of that judgment therefore upon the order of December, 1883, is this, that on the one hand the party accounting under that order can set up settled accounts, although settled accounts are not expressly mentioned in the order, and on the other hand the Plaintiffs can impeach any settled accounts set up by the Defendant, although the order is equally silent with regard to impeaching them. That as it appears to me is the plain result, not only of the words of the Lord Justice which I have read, but also of the order itself, which declared that the settled accounts were *primâ facie* evidence in favour of the Defendant as settled accounts, and also enabled the Plaintiffs to impeach them for fraud.

But the Defendant contends in the third place that this question was determined by the Court of Appeal on the former

(1) 27 Ch. D. 111, 115.

hearing, and we are asked to hold not merely that they determined what they declared, viz., that accounts audited and signed under rule 7 were *primâ facie* evidence in favour of the Defendant, but that they held that the particular accounts now in controversy were accounts audited and signed according to rule 7. It appears to me that if they had meant to determine that they would have expressed their opinion to that effect upon the face of the order. Moreover, on referring to the judgment of Lord Justice *Cotton* as reported in the *Law Journal*, I find that he says (1): "We cannot enter into the question whether the accounts relied upon by the Defendant are such as are required by the rules of the society and to which protection is given by rule 7." That contention therefore fails.

It appears to me, however, that notwithstanding the failure of the Defendant to shew that these particular accounts are settled accounts under rule 7, he may nevertheless be able to shew that they are accounts which have been settled by a person who must be deemed to have been the agent of the Plaintiffs to settle them, and that, as that point has not been brought before us in any of the proceedings, it is right that the judgment which we now pronounce should be without prejudice to that question. We shall therefore give liberty to the Defendant to shew that these are settled accounts upon any other ground than that they are accounts settled under rule 7.

As regards the question of costs, it appears to me that the Appellants ought to have brought the whole of their case upon these accounts before the Court in the first instance, instead of obtaining first an adjudication upon the general proposition whether accounts audited under rule 7 were settled accounts as against them; and, secondly, upon the minor inquiry, whether these particular accounts are accounts audited under rule 7. By separating the two questions, and bringing them successively before the Vice-Chancellor and before the Court of Appeal, they have, as it seems to me, caused unnecessary expense. We think, therefore, that the right course as to the costs will be to make no order with regard to the costs of the Appellants either in the

(1) 53 L. J. (Ch.) 775.

C. A. 1884 HOLGATE v. SHUTT. Fry, L.J.

Court below or here, but to make the costs of the Respondent, both in the Court below and here, costs in the action, so that in case the costs of the action are awarded to the Defendant, he will get these costs as part of such costs of the action. Our order will be to the following effect: This Court being of opinion that the accounts referred to in the order of the Vice-Chancellor as audited accounts of the society, have not been duly audited in accordance with the statute 10 Geo. 4, c. 56, and the 7th rule of the society, or either of them, discharge the order of the Vice-Chancellor; this order to be without prejudice to the right of the Defendant to shew that the said accounts referred to in the order of the Vice-Chancellor as audited accounts, being the accounts contained in the book exhibit A in the affidavit of Mr. *Pritchard* (giving the date of the affidavit), ought to be treated as settled accounts, on any other ground than that they were audited in accordance with the statute and rules, or any of them. Then the order as to costs will be as I have said.

BOWEN, L.J.:—

I am of the same opinion, and have nothing to add.

Solicitors for Plaintiffs: *Pritchard, Englefield, & Co.*
Solicitors for Defendant: *Johnson & Weatherall.*

H. C. J.

Applied. SHARER *v.* WALLACE. [1950] 2 All E.R. 463.

BLACKIE *v.* OSMASTON.

C. A. 1884 Nov. 26.

[1884. B. 3225]

Practice—Particulars of Demand.

Where a plaintiff claims to recover a definite sum made up of a number of items he will be ordered to give particulars of demand, though he will not be ordered to do so if he only claims an account.

The Plaintiffs by their statement of claim alleged that they and their testator had paid sums of money under a contract of suretyship under which the Defendant was also liable, and that, after deducting contributions received from other quarters, the balance paid by them was £16,233; that the Defendant had paid nothing, and was liable to pay to the Plaintiffs one half of this balance, and the Plaintiffs claimed payment of £8116. The Defendant, before putting in his defence, applied for an order that the Plaintiffs might give particulars of the sums making up the £16,233. The application was refused by Mr. Justice *Pearson*:—

Held, on appeal, that, as the Plaintiffs did not ask merely for an account, but claimed payment of a definite sum, they must give particulars of demand.

THE Plaintiffs were the executors of *Robert Blackie*, who died in October, 1881. The statement of claim, delivered in June, 1884, alleged that *Blackie*, the Defendant, and three other directors of the *Oakham Colliery Company*, by deed of the 22nd of August, 1878, as sureties for the company, jointly and severally covenanted with *E. Mackenzie* for the payment to him with interest of £32,000 lent by him to the company on a mortgage of the same date. That the company was insolvent, and was on the 24th of July, 1880, ordered to be wound up. Par. 6. That since the 22nd of February, 1881, *Blackie* during his life, and the Plaintiffs since his death, had under the covenant been required to pay, and had paid, large sums of money in paying off the balance of the mortgage money and interest and the mortgagee's costs, and had also paid various sums for dead rent and other expenses to preserve the mortgaged property, and had paid various sums for costs and expenses incurred by them as such sureties as aforesaid. Par. 7. That the said payments, including interest thereon respectively, but after deducting therefrom various sums received from the sale of the mortgaged property and from other persons than the

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Defendant as contributions in respect of such payments, amounted to £16,233 9*s.* 7*d.* Par. 8. That the Plaintiffs had as such sureties as aforesaid incurred costs and expenses not included in the above sum. That neither *Blackie* nor the Plaintiffs had received from the Defendant anything by way of contribution towards the £16,233 9*s.* 7*d.* or the above costs and expenses, and that he refused to contribute, or to indemnify them in respect of his share. The Plaintiffs claimed a declaration that the Defendant was liable to contribute, equally with *Blackie* and the Plaintiffs as his executors, towards the liabilities incurred by *Blackie* and his estate under the covenant; that the Defendant might be ordered to pay to the Plaintiffs £8116 14*s.* 10*d.*, with interest from the date of the writ till payment; an account of what was due from the Defendants to the Plaintiffs on the footing of the above declaration over and above the £8116 14*s.* 10*d.*; and the Plaintiffs asked for costs and further relief.

The Defendant before putting in his defence took out a summons asking that the Plaintiffs might be ordered to deliver particulars of the sums mentioned in pars. 6 and 7 of the statement of claim; and supported it by an affidavit that those particulars were essential for the preparation of his defence, and that unless and until particulars of the sums included in the £16,233 9*s.* 7*d.* were furnished it would be impossible for his solicitors and counsel to advise him whether he should defend only as to some and what portion of the claim, and to what extent, if any, he ought to claim contribution from the Plaintiffs in respect of the sums which he had himself paid under the guarantee, and that without particulars he could only put in a formal defence, which would not sufficiently go to the real matters in issue.

The summons was adjourned into Court, and heard by Mr. Justice *Pearson* on the 25th of July, 1884.

Ashton Cross, for the summons.

Russell Roberts, contrà, referred to *Augustinus* v. *Nerinckx* (1)

Mr. Justice *Pearson*, without giving any formal judgment, refused the application.

(1) 16 Ch. D. 13.

The Defendant forthwith gave notice of appeal, but on the 6th of August delivered a defence and counterclaim, stating that about the time when the guarantee mentioned in the statement of claim was given, *Blackie*, the Defendant, and ten others, signed an agreement of sub-guarantee by which the signatories guaranteed the signatories of the original guarantee against loss, in the several proportions specified in the sub-guarantee; that the Plaintiffs or *Blackie* had taken proceedings under that sub-guarantee, to none of which had the Defendant been a party, and that his liability could not be ascertained except on the footing of both the guarantees, nor without the other parties thereto being before the Court; that the Defendant had always been ready and willing to contribute his share of any moneys properly paid or payable under the guarantees, and had in fact paid nearly £10,000 in respect thereof; that the Plaintiffs refused to give particulars of what *Blackie* and they had paid, and of the various sums received by them from sales of mortgaged property and from contributions, and that without such particulars the Defendant could not ascertain the nature and validity of the Plaintiffs' claim. By way of counterclaim the Defendant claimed contribution from the Plaintiffs in respect of all payments made by the Defendant under the guarantees.

The appeal was heard on the 26th of November, 1884.

Ashton Cross, for the appellant:—

In this case particulars are necessary in order that the Defendant may be enabled to prepare his defence properly. *Augustinus* v. *Nerinckx* (1) was referred to against me in the Court below, but the decision does not apply, since here the Plaintiffs are not asking for an account, but for payment of a specified sum. The observations of *Cotton*, L.J., and *Jessel*, M.R. (2) are in my favour.

Everitt, Q.C., and *Russell Roberts*, *contrà*:—

This is a mere question of amount, the burden of proof is on us to shew what sums we have paid, and there is no occasion for particulars. If particulars are necessary to enable a defendant to

(1) 16 Ch. D. 13. (2) 16 Ch. D. 17, 18.

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frame his defence the Court will order them, but not to enable him to raise a counterclaim.

[BOWEN, L.J.:—I never before have heard it suggested that although the plaintiff's claim is for a definite sum he will not be ordered to give particulars, because the defence is of the nature of a counterclaim.]

The question of particulars is in the discretion of the Judge, and the Court of Appeal will not readily interfere with the exercise of that discretion.

BAGGALLAY, L.J.:—

We should be unwilling to differ from the Judge in the Court below in a matter of discretion, but the present case does not appear to me to be one of simple discretion. The claim is by executors to recover one half of a sum of £16,233 9*s.* 7*d.*, alleged by them to have been paid by their testator and themselves, and of which they say that the Defendant is liable to pay one half. If the action had been merely for an account of what the Plaintiffs and their testator had paid, I should have been of opinion that an order for particulars ought not to be made. But that is not the case. The Plaintiffs have launched their case in this way—they allege that they and their testator paid sums of money under the suretyship mentioned in the statement of claim, and received various sums by way of contribution from other sources, and that, after deducting the sums so received, there remained due a balance of £16,233 9*s.* 7*d.*, of which alleged balance they ask that the Defendant may be decreed to pay them one half. Now it is true that it is not the practice of the Court to order the plaintiff to give particulars where he only asks a general account, but the rule is otherwise where he asks for payment of a definite sum. The distinction was taken in *Augustinus* v. *Nerinckx* (1) between claims for an account and claims for a definite sum. *Cotton*, L.J., there says: (2) "If the defendant only wants the pleadings made sufficiently distinct to enable him to frame his defence properly, he ought to be held entitled to the particulars," and *Jessel*, M.R., says, "no specified sum is claimed, but an account is asked for,

(1) 16 Ch. D. 13. (2) 16 Ch. D. 17.

and in order to enable the defendant to put in a defence to such an action it is not necessary that she should know the particulars of the sums advanced and the times when they were advanced." The distinction there drawn should have been adopted here. If the statement of claim had merely asked for an account of what had been advanced by the Plaintiffs or their testator, and payment by the Defendant of his share of what should be found to have been advanced, I think that particulars would properly have been refused as unnecessary—but under a statement of claim in the present form I think that particulars would be very useful for enabling the Defendant to frame his defence.

BOWEN, L.J.:—

I am of the same opinion. In a matter of practice arising in a case belonging to the Chancery Division I hesitate in differing from a Judge who is experienced in Chancery business, but if this matter is to be treated in the same way as if it were in the Queen's Bench Division, then the claim being for a specific sum, made up of items presumably not known to the Defendant, particulars are of course. I agree with what *Baggallay*, L.J., has said as to the distinction between cases where the plaintiff asks for an account and cases where he asks for a specified sum.

FRY, L.J.:—

I am of the same opinion. The rule is that where the plaintiff is claiming a specific sum he must give particulars of demand, and I see nothing in this case to induce the Court to depart from that rule.

Solicitors for Plaintiffs: *Brook & Chapman.*
Solicitor for Defendant: *H. Fox.*

H. C. J.

KAY, J.

1884

Oct. 31;
Nov. 19.

In re VARDON'S TRUSTS.

Election—Married Woman—Settlement on Marriage of Female Infant—Life Interest for Separate Use—Restraint on Anticipation—Covenant by her to settle after-acquired Property — Bequest to her after Twenty-one during Coverture for her Separate Use—Voidable Covenant—Approbation and Reprobation—Sequestration of Life Interest.

The doctrine of election is founded upon the rule that a person cannot take under and against the same instrument, and the equity is not that the person electing to take against the instrument shall be required to assign, but that he shall not be permitted to take, the benefit given to him thereunder.

Accordingly the Court is not prevented from enforcing this rule by the incapacity of the person so electing to alienate the interest taken under the settlement. And upon this principle the Court can, notwithstanding a restraint on anticipation attaching thereto, sequester the life interest of a married woman electing to take against a settlement until compensation has been made thereout to the persons disappointed under the settlement by such election.

Upon the marriage of a female infant in 1860 personalty was settled by her father upon trusts under which she took the first life interest for her separate use without power of anticipation, and the settlement contained a covenant by her to settle all her after-acquired property upon trusts under which the husband took the first life interest. In 1883 and during the coverture personal property was bequeathed to her for her separate use, and she chose to avoid her covenant and to take this property instead of bringing it into the settlement. She also contended that she was entitled to keep the life interest under the settlement which she was restrained from anticipating without making compensation thereout to the persons disappointed under the settlement, upon the ground that as she was restrained from alienating such life interest the Court could not impound it:—

Held, that as the married woman had elected to defeat one of the provisions of the settlement, she was not competent to take a life interest under another of them, and that, notwithstanding the restraint on anticipation, the income which would have been payable to her if she had not so elected, ought to be applied in making compensation to the persons disappointed by her election for the benefits of which they had been thereby deprived, and that the trustees of the settlement must retain and apply the same accordingly.

Smith v. *Lucas* (1) and *In re Wheatley* (2) dissented from.

PETITION and adjourned summons.

By a settlement made in the year 1860 in contemplation of the marriage between *Emily Laura Bethune Vardon*, then an infant,

(1) 18 Ch. D. 531. (2) 27 Ch. D. 606.

and *Jonathan Walker Metcalfe Walker*, after reciting, amongst other things, that it had been agreed that she and her intended husband should enter into the covenant thereinafter contained for the settlement of her future estate and effects, Mr. *Walker*, the intended husband, settled certain property upon trust for himself for life, and then for his intended wife for life, and then for the children of the marriage; and by the same settlement Mr. *Vardon*, the father of the intended wife, settled certain other property consisting of moneys and shares upon the like trusts except that as to a sum of £5000, part thereof he gave the intended wife the first life interest therein for her separate use without power of anticipation. And the settlement contained a covenant by each of them the husband and wife to settle any after-acquired property of the wife upon the trusts thereinbefore declared concerning the property of the husband, except that the ultimate trust in default of children was for the wife.

In the year 1883, under a bequest in the will of a brother who then died, Mrs. *Walker* became entitled to a share of residue of the value of £8573 for her separate use. Mrs. *Walker* elected to avoid her covenant to settle after-acquired property, and claimed to take possession of the bequeathed property without making compensation for it out of the life estate which she took under the settlement without power of anticipation. The executors of the will thereupon paid the £8573 into Court under the *Trustee Relief Act*, and Mrs. *Walker* presented a petition for the payment out of the fund to her. Upon her petition coming on for hearing, it was arranged, with the sanction of the Court, that in order to give the Court jurisdiction to entertain the question as to the effect of Mrs. *Walker's* election, an originating summons under Order LV. should be taken out, and that at the hearing of the petition the matter should be treated as if such summons had been taken out and adjourned into Court, and had then come on for hearing.

W. Pearson, Q.C., and *E. Ward*, for Mrs. *Walker*:—

The fund in Court is not within the operation of Mr. *Walker's* covenant to settle his wife's after-acquired property, for it was bequeathed to her for her separate use. The covenant by Mrs. *Walker* when an infant and in contemplation of her marriage to

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settle her after-acquired property is voidable, but binding upon all property coming to her for her separate use until she avoids it as to such property: *Willoughby* v. *Middleton* (1). She has, however, chosen to avoid it, and the question is what is the effect of her so doing. In *Willoughby* v. *Middleton* where (as here) the separate use was accompanied by a restraint on anticipation, it was held that the married woman must elect either to bring the property bequeathed for her separate use into the settlement, or to make compensation for it out of the settled property which she was restrained from anticipating. But the decision on this point was expressly disapproved of by the late Master of the Rolls in *Smith* v. *Lucas* (2); and we submit that it is not sound in principle, and that Mrs. *Walker* is entitled to take possession of this bequeathed property without giving up any part of her life interest under the settlement. The doctrine of election is one of compensation, and a person cannot forfeit an interest in settled property who is not liable to make compensation out of the settled property for what is taken away by the so-called election. Here the married woman is restrained from alienating her life interest, and she cannot by an act of election make that alienable which was inalienable before: *Smith* v. *Lucas* (3). It is impossible for her to give up that which she cannot anticipate and cannot deprive herself of or deal with in any way until it is actually payable to her. Neither can it be taken away from her. The principle of *Smith* v. *Lucas* has been recently followed by *Chitty*, J., in *In re Wheatley* (4).

It is settled that a married woman could not prior to the Act of 1882 contract as to property which was non-existent at the date of the contract, and that her general engagements could not be enforced against separate estate which she was restrained from anticipating at the time of the engagement: *Pike* v. *Fitzgibbon* (5).

We accordingly ask for transfer of the fund to Mrs. *Walker*, and for a direction that her choosing to retain this fund will not affect the property settled to her separate use for life without power of anticipation.

(1) 2 J. & H. 344.
(2) 18 Ch. D. 531.
(3) 18 Ch. D. 545, 546.
(4) 27 Ch. D. 606.
(5) 17 Ch. D. 454.

They also referred to *Griffith-Boscawen* v. *Scott* (1).

Hastings, Q.C., and *Charles Parke*, for the trustees of the settlement:—

The principle applicable to this case is simply that a person cannot accept and reject one and the same instrument, and this is the foundation of the doctrine of election: *Codrington* v. *Codrington* (2). It does not depend upon the power of the married woman to alienate or to give up anything. Nor is it limited to cases in which she has the capacity to "make compensation." It is the Court which says to her, you shall not take both under and against the instrument, and which by its order will if necessary impound or sequester her interest under the settlement, whether subject to a restraint on her anticipation or not, until there has been made good thereout to the persons disappointed under the settlement the amount which she has insisted on retaining against it: *Willoughby* v. *Middleton* (3); *Codrington* v. *Lindsay* (4); *Cooper* v. *Cooper* (5); *Pickersgill* v. *Rodger* (6); *Wilson* v. *Lord Townshend* (7); *Wall* v. *Wall* (8); *Robinson* v. *Wheelwright* (9); *Cahill* v. *Cahill* (10). The case of *Smith* v. *Lucas* (11) was much relied on by the other side, but upon this question it was not a decision at all, and only a *dictum* upon a point which (so far as it was argued) was argued upon a mistaken impression of the principle of the decision in *Robinson* v. *Wheelwright*. Again, the decision in *In re Wheatley* (12) seems to have been limited to cases in which the question of election was raised upon the face of two clauses in the same will, a totally different case to this.

There is nothing therefore but the *dictum* in *Smith* v. *Lucas* against the direct decision in *Willoughby* v. *Middleton;* and we submit that the Court should order the trustees to retain the income which would be payable from time to time to Mrs. *Walker* until the amount lost to the settlement has been thereby made good.

(1) 26 Ch. D. 358.
(2) Law Rep. 7 H. L. 854.
(3) 2 J. & H. 344.
(4) Law Rep. 8 Ch. 578.
(5) Ibid. 7 H. L. 53.
(6) 5 Ch. D. 163.
(7) 2 Ves. 693.
(8) 15 Sim. 513.
(9) 6 D. M. & G. 535.
(10) 8 App. Cas. 420.
(11) 18 Ch. D. 531.
(12) 27 Ch. D. 606.

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Sayles, for the executor of the will.

W. Pearson, in reply :—

The meaning of the rule that a person shall not take under and against an instrument, or as it is sometimes expressed, shall not "approbate or reprobate," is that he shall not take anything under it which he can by any possibility give up. Here the married woman cannot take her life interest out of the settlement, and it is submitted that the Court cannot make her give it up.

1884. Nov. 19. KAY, J., after stating the facts of the case :—

The property bequeathed to Mrs. *Walker* for her separate use in 1883 was, of course, not bound by the covenant of her husband, because, being limited to her separate use, he could have no interest in it. It was, however, bound by the covenant of the wife, but as she was an infant at the time of the marriage that covenant was voidable.

The property in question being given to her for her separate use, she is in the position of a *feme sole* as to it, and she now elects to avoid her covenant as to this property, and to take it for her separate use, not under but against the settlement. The question is what is the consequence of the election ? The ordinary rule is that no person can take a benefit under an instrument without fulfilling all its provisions, or as it is sometimes shortly expressed, you cannot take under and against the same instrument, or as some judges have said, adopting a phrase borrowed from Scotch lawyers, you cannot both "approbate and reprobate."

If the provision made for the lady by her father in this settlement had been free from the restraint upon anticipation it is not denied that the Court, under the circumstances, would impound her present life interest in the property settled by her father until it thereby made good to the parties disappointed that which they have lost by this exercise of her election.

Is the Court prevented from enforcing this equity by reason of the restraint upon anticipation ? That depends mainly upon this consideration—whether under the doctrine in question the lady is disabled from taking the life interest, or whether she is required

to assign it over either wholly or in part. If the latter be the true view, of course she is unable to assign, but if the former, then it would seem that her ability to assign has nothing to do with the question.

Referring to the earliest cases on the subject I find in *Noys* v. *Mordaunt* (1) Lord Keeper *Cowper* states that in such cases the gift is upon an implied condition that the donee shall carry out the whole instrument.

In *Streatfield* v. *Streatfield* (2), *Talbot*, L.C., states the rule thus: "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; as was done in *Noys* v. *Mordaunt*: there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made."

Lord *Loughborough*, in *Lady Cavan* v. *Pulteney* (3), cites with approbation the language of *De Grey*, L.C.J.: "The equity of this Court is to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee."

In *Wilson* v. *Lord Townshend* (4), Lord *Loughborough* says: "The principle of these cases is very clear. The application is more frequent here; but it is recognized in courts of law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights. . . . When you claim under a deed, you must claim under the whole deed together; you cannot take one clause, and desire the Court to shut their eyes against the rest. Suppose, in a will a legacy is given to you by one clause; by another, an estate, of which you are in possession, is given to another person; while you hold that, you shall not claim the legacy. It applies, as Chief Justice *De Grey* very properly applied it in *Lord Darlington* v. *Pulteney*, to interests of married women, interests immediate, remote, contingent, of value or not of value. You cannot dispute the ownership. It applies in the case of personal legacies. If a specific thing, belonging to one of the legatees, is by the will given to another person, the legatee cannot hold both. He must make himself competent to take the

(1) 2 Vern. 581.
(2) Cas. t. Tal. 176, 182.
(3) 2 Ves. 544, 560.
(4) Ibid. 693, 696.

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legacy, by giving up that specific thing. Therefore the Court says, there shall be an election; and gives an opportunity of electing; and will not easily hold the election concluded. But if the party is under restraint, and cannot accomplish that, it is the misfortune of the party; but the consequence is, that while he continues in that situation, his claim must be barred; for it is directly contrary to the intention and distribution of the property."

Lord *Hardwicke*, in *Kirkham* v. *Smith* (1), says: "These principles are admitted; that according to *Noys* v. *Mordaunt* (2), where one taking himself to be an absolute owner of an estate, when he was not so, devised it away, and gives an estate, whereof he was absolute owner, to the person claiming a remainder in tail in the other estate devised away; the Court will not suffer that person to have both estates by claiming in contradiction to the will in another part . . . as on a devise to a younger son, of lands intailed and a legacy to the elder, the elder shall not claim the legacy and defeat the devisee, but shall make his election."

That the person electing "cannot take" the benefit given to him without fulfilling all the provisions of the instrument, is stated by Lord Commissioner *Eyre* in *Blake* v. *Bunbury* (3).

Sir *Thomas Plumer*, in *Gretton* v. *Haward* (4), says that the practical consequence of electing to take against an instrument is that a person so electing is "not permitted to retain, but must relinquish, the benefits which it purports to confer on him." And after referring to Lord *Loughborough's* approbation of the language of Lord Chief Justice *De Grey* that "the equity of this Court is to sequester the devised estate *quousque* till satisfaction is made to the disappointed devisee," he continues, "I conceive it to be the universal doctrine that the Court possesses power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands."

Lord *Eldon* says in *Lord Rancliffe* v. *Parkyns* (5), "If I choose to devise my real estate to the noble marquis opposite . . . . and

(1) 1 Ves. Sen. 258, 260.
(2) 2 Vern. 581.
(3) 4 Bro. C. C. 21.
(4) 1 Sw. 409, 421, 423.
(5) 6 Dow. 149, 179.

in the same will I dispose of an estate which is not mine but his, a Court of Equity will say that he shall take no benefit from that will unless he makes good the whole of the will."

In *Ker* v. *Wauchope* (1) Lord *Eldon*, in giving judgment in the House of Lords, says, "It is equally settled in the law of *Scotland*, as of *England*, that no person can accept and reject the same instrument. If a testator gives his estate to *A.*, and gives *A.'s* estate to *B.*; Courts of Equity hold it to be against conscience that *A.* should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person."

Mr. *Swanston's* conclusion from an examination of the authorities in a valuable note (2) is thus expressed: "In the event of election to take against the instrument, the Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints," and that the surplus after compensation is "restored to the donee."

The cases on this subject are so numerous that I might multiply these citations indefinitely, but it is sufficient to point out that in the latest decisions in the House of Lords the statement of the doctrine in the earliest cases is expressly recognised and adopted.

In *Cooper* v. *Cooper* (3), Lord *Cairns*, in giving judgment, cites at length the language of the learned Judges in *Noys* v. *Mordaunt* (4) and *Streatfield* v. *Streatfield* (5) (to which I have referred), to the effect that there is a tacit condition annexed to the benefit out of which compensation must be made—as being the law of the Court at this day.

In *Codrington* v. *Codrington* (6) a married woman during the coverture joined in a deed by which her husband and her father both brought property into settlement, and whereby she also

(1) 1 Bli. 1, 21.
(2) 1 Sw. 441.
(3) Law Rep. 7 H. L. 53, 63.
(4) 2 Vern. 581.
(5) Cas. t. Tal. 176, 182.
(6) Law Rep. 7 H. L. 854.

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purported to settle her reversionary interest in certain personal property. The marriage was afterwards dissolved, and then the reversion fell in, and she claimed to take it against the settlement, and it was held to be a case of election, and Lord *Cairns* said (1): "By the well-settled doctrine, which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our Courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." The order of the House, which is given at the end of the report, is framed most carefully to carry out this view. It provides for compensation out of the interest to which the married woman "would have been entitled" if she had not elected to take against the settlement.

Accordingly I must treat the life interest in the property settled by her father which this lady claims under the settlement as being subject to an implied condition that if she elects to defeat the settlement in another of its provisions she is not "competent to take" that life interest, but the Court will "sequester" it so far as may be requisite to compensate the persons claiming under the settlement who are disappointed by such election.

If that condition had been expressed there would be nothing repugnant in limiting the life interest to her separate use without power of anticipation.

The whole provision would be something to this effect—upon trust, in case the intended wife should fulfil the provisions of the settlement on her part, for her for life for her separate use without power of anticipation, but if not, then upon trust for the persons whose intended interest will be defeated by her until they are compensated.

There is a long series of cases in which the Court has elected for persons under disability. I am not aware of any instance in which having elected for an infant to take against the instrument the Court has hesitated to decree compensation out of the estate devised to the infant because of his inability to convey.

(1) Law Rep. 7 H. L. 861.

I am compelled to refer to these early authorities and to the principle on which the doctrine of election is founded by certain modern decisions and *dicta* which I will now mention.

In *Robinson* v. *Wheelwright* (1), where a legacy was given to a married woman upon an express condition that she should convey an estate which she was restrained from anticipating, it was held that the Court had no power to interfere to assist her to make such conveyance. But Lord Justice *Turner* says, "What the result would have been if the case had been simply a case of election unaffected by condition, it is unnecessary for us to determine, but as at present advised I am not satisfied that the principle of election might not have been applied, and the rights under it effectually worked out."

I agree that too much stress ought not to be laid upon mere *dicta*, but in the case of a Judge so learned and careful, I think that may be considered an intimation of opinion deserving attention and respect, that the restraint upon anticipation was not material in a case of election.

In *Willoughby* v. *Middleton* (2), the facts of which case are more fully stated by Lord *Selborne* in *Codrington* v. *Lindsay* (3), it appears that a settlement was executed by a lady in contemplation of her marriage while she was an infant, which contained a covenant by herself and her husband that a certain trust fund, to which she was entitled in reversion upon her mother's death, and also all other personal estate to which she might become entitled during the coverture, should be settled on trusts for the benefit of the wife, the husband, and children, under which she took the first life interest for her separate use without power of anticipation. On the death of the wife's mother during the coverture, the specified trust fund became vested in the wife in possession, and by the same event she became also entitled to certain valuable legacies for her separate use without any restraint on anticipation under her mother's will. It was decided by Vice-Chancellor *Wood* that although she was at liberty to refuse to bring those legacies into the settlement, yet, if she did so, the life interest in the specified fund which her husband had then power

(1) 6 D. M. & G. 535, 548. (2) 2 J. & H. 344.
(3) Law Rep. 8 Ch. 590.

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to reduce into possession, and which was therefore effectually bound by his covenant in the deed, could not be claimed by her. His words are these (1): "Then the question arises, what she is to do if she elects against the deed. She says, she takes under the deed nothing but a reversionary interest which cannot be dealt with, and certain property settled to her separate use without power of anticipation. But the correct view, in my opinion, is this,—that, when the doctrine of election intervenes, it takes the fund out of the settlement. This fund cannot be claimed without giving up the property which is referred to in the covenant; and, if this is not done, the fund becomes in equity no longer subject to the provisions of the settlement. It ceases to be a settled fund. The husband settled it on his wife with a restraint on anticipation on the faith that all the provisions of the settlement would be carried into effect. The wife, therefore, cannot touch the fund given to her for her separate use with a restraint on anticipation, except by bringing in the other property so as to make good the rights of all parties interested under the deed."

This case was carefully considered by Lord *Selborne*, who sent for the papers and who gave, from his examination of them, the statement of the decision which I have quoted. His Lordship does not intimate any doubt of the propriety of that decision.

On the other hand, in the case of *Smith* v. *Lucas* (2), the late Master of the Rolls, after deciding that an infant entering into such a covenant in a marriage settlement, if property comes to her during the coverture which would *primâ facie* be bound by the covenant, may choose not to be so bound, then considers what is the consequence of her electing to take such property against the settlement upon a provision for her separate use without power of anticipation contained in it. And at p. 545 he expresses himself thus: "Then, what is the effect of the restraint on anticipation imposed by the settlement? I am not going to discuss this point for the sake of finally deciding it, but I must say it does not appear to have been considered sufficiently by the learned Judge who decided *Willoughby* v. *Middleton* (3). I am by no means clear that the effect of the wife's so-called election, that is,

(1) 2 J. & H. 355. (2) 18 Ch. D. 531.
(3) 2 J. & H. 344.

of her decision to keep her property to her separate use free from the voidable covenant, does deprive her of the property settled to her separate use without power of anticipation. No doubt, as a general rule, the person who elects to take against a deed forfeits all interest under the deed: the doctrine is one of compensation, although I have used the word 'forfeit': but can a person forfeit an interest who is not liable to make compensation out of the property given to him or her by the deed for what is taken away by election? In the case we have here of a married woman, can that doctrine extend to property which is, so to speak, not the person's own who elects, which is her own only in a modified sense—it is her own, but is incapable of alienation? Can she by an act of election make that alienable which was not alienable before? In electing she disappoints those who take less by reason of her election, but it does not appear to follow that you can thereby take away from her, in consequence of her act, that which was inalienable. I do not intend finally to decide the point, but it is one deserving consideration. If the doctrine were established according to the judgment of the Vice-Chancellor in *Willoughby* v. *Middleton* (1), this effect would follow, that the most careful provision for the protection of a married woman would be destroyed by reason of her election thereafter to take some property for her separate use (assuming she was an infant when she married), and the whole of her life interest provided for her by her father or relatives would be taken away. I should hesitate long before coming to such a conclusion; and it does not appear to me that the point was either sufficiently discussed in *Willoughby* v. *Middleton*, or sufficiently considered by the learned Judge who decided that case; therefore I do not regard that case as finally deciding the point so far as relates to the property or interest of the married woman in respect of which she is restrained from anticipation. It seems to me that it may well be held that the property remains inalienable as it was before, notwithstanding the act of the married woman in electing to take her own property, and that the persons who take under the settlement have no right to complain, because they know it was property which no act of hers could divest her of. However, it does

(1) 2 J. & H. 344.

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not appear necessary to finally decide that point now, and I have only thrown out these observations in order that it may not be considered that I thought the point finally settled by the case referred to."

This, as appears by the language, was not a decision but merely a *dictum*, and I do not think it can have the same weight as the deliberate decision of Lord *Hatherley* in *Willoughby* v. *Middleton* (1).

There is in the language of the Master of the Rolls a suggestion that, as matter of construction, it might be held not to be the intention of the settlement that if the wife elects to take against it, she should be deprived of the life interest which she is restrained from anticipating. That would make the restraint upon anticipation equivalent to a provision that she may elect to take other benefits against the settlement and yet retain this life interest. Is that a reasonable construction? If the parties to the settlement intended that this equitable rule of election should not apply, must not that be expressed, or at any rate much more clearly indicated than by this provision restraining anticipation, which, as I have said, does not seem to me to be inconsistent with the condition of compensation that is implied. Supposing that the inalienable life interest was the only provision out of which compensation could be given, such a construction would be equivalent to striking the wife's covenant to settle other property out of the settlement altogether.

In a recent case of *In re Wheatley* (2), which is not yet reported (3), Mr. Justice *Chitty* has followed this *dictum* of the late Master of the Rolls in preference to the decision of Lord *Hatherley*. I am therefore obliged in this case to determine which of these conflicting decisions and *dicta* I ought to follow, and I have accordingly endeavoured to consider the question on principle; and for the reasons which I have given, it seems to me, with great respect for the opinions from which I dissent, that the restraint upon anticipation does not prevent the Court from giving compensation out of the life interest of the married woman to the persons who are disappointed by her election to take against

(1) 2 J. & H. 344. (2) W. N. 1884, 171.
(3) Since reported: see 27 Ch. D. 606, 607.

the settlement. Following the language of the order of the House of Lords in *Codrington* v. *Codrington* (1), I declare that the income which would have been payable to the lady if she had not so elected, and all other (if any) the interest to which, if she had not so elected, she would have been entitled under the settlement, ought to be applied in making compensation to the persons disappointed by her election, for the benefits of which they respectively have been or will be thereby deprived, and the trustees of the settlement must be directed to retain and apply the same accordingly. I shall give no costs to the married woman, who will of course take the separate property which she elects to take free from the settlement; the trustees of the settlement will retain their costs out of the impounded income; and there must be liberty to apply as to the mode in which the impounded fund is to be dealt with.

Solicitors: *Talbot & Tasker; Poole & Co.; Edward F. M. Ryan.*

(1) Law Rep. 7 H. L. 854.

W. W. K.

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HAYWARD *v.* EAST LONDON WATERWORKS COMPANY.

[1884 H. 3989.]

Injunction—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 68 [*Revised Ed. Statutes, vol. x., p.* 74]—*Jurisdiction.*

Although the statutory remedy provided by sect. 68 of the *Waterworks Clauses Act*, 1847, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, and the special remedy by penalties given by sect. 43 against a company for withholding water, have not ousted the general jurisdiction to restrain the company by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under sect. 68.

PLAINTIFF was the lessee for ninety-nine years from Christmas, 1870, of thirty-nine houses, occupied by weekly tenants, at *West Ham*, within the district supplied by the Defendants, the *East London Waterworks Company*. In August, 1884, a demand was made for two quarters water rate to Midsummer, 1884, in respect of the thirty-nine houses, amounting to £12 6*s.* 3*d.* The Plaintiff thereupon called at the company's offices, and stating that he disputed the amount of rate as demanded, tendered £14 18*s.* 2*d.* (calculated upon the parochial rateable value of £10 per house) in payment of the three quarters to Michaelmas, 1884. This tender was not accepted, and after some discussion had taken place without any agreement being arrived at, the Plaintiff, on the 30th of September tendered £19 17*s.* 6*d.* for one year's water rate to Christmas, 1884. This tender was refused by the district collector, who said that he should have to give the Plaintiff notice of discontinuance of the water supply; and on the 2nd of October the Plaintiff received a notice headed "Last Application," stating that unless the amount claimed by the company (£24 16*s.*) was paid within seven days the supply would be cut off and further proceedings taken for recovery of the amount due. The Plaintiff wrote requesting particulars shewing upon what annual value the amounts claimed were calculated. Some correspondence followed,

in which the Plaintiff reminded the Defendant company that "a dispute exists between the company and myself with reference to the annual value of the premises supplied;" that a *bonâ fide* tender had been made by him in respect of the water rates for the four quarters to Christmas next, and that unless the notices threatening the discontinuance of the supply were withdrawn he should be compelled to take steps for the protection of his tenants. The company in their reply stated that if the Plaintiff would furnish particulars to enable them to reassess the property it would be reassessed accordingly, and "if we do not agree on a reassessment it will be your duty, should you still object, to take the company before a magistrate—only observe this must be done forthwith. Please note we are supplying the water on the existing terms till judicially varied."

The Plaintiff had thereupon issued a writ, and on the 15th of October Mr. Justice *Chitty*, sitting as Vacation Judge, upon motion on behalf of the Plaintiff, *ex parte*, granted an interim injunction restraining the Defendant company from cutting off the water supply to the Plaintiff's houses, upon payment by Plaintiff into Court of the full amount of the company's claim without prejudice to any question in the action.

The motion was now renewed, and a continuance of the interim order asked for.

The material sections of the general and special Acts relied upon in the argument were: *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 43.

Sect. 43. "If (except when prevented as aforesaid) the undertakers .... neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered they shall be liable to a penalty of £10, &c., &c."

Sect. 53. "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof according to the provisions of this and the special Act, be entitled

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to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

Sect. 68. "The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

Sect. 70 provided that rates should be paid quarterly in advance.

Sect. 74. "If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than £20, with the expense, of cutting off the water, and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act; or if the rate so due amount to £20 or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any Court of competent jurisdiction."

The *East London Waterworks Act*, 1853 (16 & 17 Vict. c. clxvi.), which incorporated the *Waterworks Clauses Act*, 1847, except the provisions with respect to the communication pipes to be laid by the undertakers of that Act, and sects. 35, 36, provided:

Sect. 74. "The company shall at the request of the owner or occupier of any house or part of a house, &c., within their limits in which any main or service-pipe of the company is or shall be laid, or of any person who under the Act shall be entitled to demand a supply of water for domestic purposes, furnish to such person, by means of communication pipes and other necessary and proper apparatus, to be provided, laid down, and maintained at the cost of such person, a sufficient supply of water for his domestic purposes at a rate *per cent. per annum* on the annual value of the house not exceeding £5."

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Romer, Q.C., and *Godefroi*, in support of the motion :—

We claim that the rate payable is, according to *Dobbs* v. *Grand Junction Waterworks Company* (1), payable only on the net annual value, but the Defendants are insisting upon the larger rate, *i.e.*, the gross annual value. We have tendered payment in advance on our basis. That tender has been refused, and instead of having the dispute, which is a *bonâ fide* dispute as to the annual value of the tenements to be charged with the rate, determined by two justices, in accordance with the *Waterworks Clauses Act*, 1847, sect. 68, they threaten to cut off the water, in order by that pressure to compel us to pay what we say is an unjust and excessive demand. The effect of the *Waterworks Clauses Act*, 1847, sect. 53 (which is incorporated with Defendant company's special Act), is to create a statutory obligation on the part of the company to supply water for domestic purposes to every owner or occupier within the district who has paid or tendered the rate; and it also (sect. 74) gives the company the right to cut off and stop the supply if —and only in that case—there is default on the part of the occupier in payment. Accordingly the company have no right to cut off the supply if the person entitled to receive the water pays or tenders his rate. In these circumstances, pending the determination under sect. 68 of the dispute as to value by two justices, which the company, and not the Plaintiff, are the proper persons to obtain, we are entitled to be protected by injunction against the irreparable injury of having the water-supply of 150 persons entirely stopped.

[CHITTY, J. :—You have not started the proceeding before the justices?]

No, and we are not bound to. I think I can shew that the proper persons to do that are the company.

[CHITTY, J. :—Can you ask for an injunction until that is done?]

We ask for an injunction until the point is determined by the justices, that is all. The company can get a decision speedily and at once if they choose.

[CHITTY, J. :—Why is it not as easy for you?]

(1) 9 App. Cas. 49.

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At any rate, before a decision could have been obtained they would have cut off the water if we had not come here and got an injunction, and we should have been forced in that way to submit to their demand.

In the *New River Company* v. *Mather* (1) it is distinctly laid down that where there is a dispute as to the annual value, that dispute must be first determined by the justices before the company can pursue the remedies given by sect. 74 of cutting off the supply and recovering the rate and expenses by action (2).

With respect to granting an injunction, all we ask is that matters be kept *in statu quo* until the question is decided, and that the company be not allowed to avail themselves of the remedy which is only given to them when the person bound to pay has neither paid nor tendered the current rate. "If before the undertakers had cut off the supply, the amount of the current rate had been tendered to them, they would have had no right to cut it off, and would have been bound to supply the water notwithstanding there might have been anterior rates still due to them:" *Sheffield Waterworks Company* v. *Wilkinson* (3), *per Bramwell*, L.J.

R. S. Wright, for the Defendant company, relied upon *Low* v. *Lambeth Waterworks Company* (M.R., 6th July 1875, unreported), where the late Master of the Rolls held that in the view of the Legislature the depriving a house of water was not that special or irreparable injury which authorized this Court to interfere, and also that the Court could not grant a mandatory injunction which would have the same force as an order restraining the company from neglecting to do the thing: what the plaintiff asked being, though called an injunction, in fact specific performance. "So long as he pays his rates and does not waste the water, &c., I am to order the defendants to supply him with water, that is really the effect of it. It is one of those cases of what has been called continuous specific performance." And his Lordship based his decision upon *Weale* v. *West Middlesex Waterworks Company* (4), where Lord *Eldon* was clearly of opinion that he could

(1) Law Rep. 10 C. P. 442.
(2) Ibid. 452, 454.
(3) 4 C. P. D. 410, 422.
(4) 1 Jac. & W. 358.

not compel the company to supply water either directly or indirectly without some special authority from the Legislature (1).

In *Atkinson* v. *Newcastle and Gateshead Waterworks Company* (2) it was held that a new and sufficient remedy by penalties, for failure to supply water, having been provided by the *Waterworks Clauses Act*, 1847, s. 43, any remedy, to the person injured by the breach of statutory duty, by action for damages was gone. Since the *Judicature Act*, 1873, s. 25 (8), the jurisdiction to grant an injunction has not been extended, but the procedure only has been thereby regulated: *North London Railway Company* v. *Great Northern Railway Company* (3).

[CHITTY, J., referred to *Hedley* v. *Bates* (4).]

That case was distinguished on the ground, apparently, that there was a remedy which could have been applied by some division of the High Court, and therefore it was not necessary for the purposes of the *North London Railway Case* to say that it was wrongly decided. Even if the remedy by injunction has not been ousted by the statutory remedy provided by sect. 43, no case of serious inconvenience sufficient to induce the Court to interfere has been shewn. All that the Plaintiff has to do is to pay upon the company's assessment and then apply to the justices under sect. 68; and if he can satisfy them that the company are wrong he will get back what has been paid in excess. This action cannot decide the question between the parties—whether the proper amount has been tendered by the Plaintiff—and until that question has been decided by the proper tribunal as provided by sect. 68, the Court cannot interfere on behalf of the Plaintiff, though on the other hand the company may not be able to enforce payment of the rate by action: *The New River Company* v. *Mather* (5).

The distinction between the company bringing an action for the price of the water and the occupier bringing an action in respect of the discontinuance of the water was accepted and recognised in *Whiting* v. *East London Waterworks Company* (*A. L. Smith*, J., 4th July, 1884). We have not cut off the water, but as the Plaintiff

(1) 1 Jac. & W. 374.
(2) Law Rep. 6 Ex. 404; 2 Ex. D. 441.
(3) 11 Q. B. D. 30.
(4) 13 Ch. D. 498.
(5) Law Rep. 10 C. P. 442.

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by not paying or tendering the proper amount in advance has not put himself into a position to demand a supply, the supply is voluntary on the part of the company, and they are entitled to refuse to continue the supply.

Romer, in reply:—

In that case what was decided was that where there had been no tender of any kind, the plaintiff could not possibly say that he was entitled to receive a supply of water, and if not entitled to receive, the company, who were only voluntarily supplying, were entitled to stop the supply. That is not the case here as we have made the tender, and the effect of sects. 53 and 74 of the *Waterworks Clauses Act*, 1847, and of sect. 74 of the company's special Act, is that the company has no right to cut off the water if the person who is entitled to receive it pays or tenders his rate.

All that we ask for is an injunction until the question of the proper amount payable has been determined by the justices, and the Court has jurisdiction to grant such injunction: *Hedley* v. *Bates* (1); *Cooper* v. *Whittingham* (2).

Low v. *Lambeth Waterworks Company* is distinguished, as that was the case of an application for a mandatory injunction to compel the company, who had discontinued the supply, to continue it. Here it is of the essence of the case that we are being supplied, and we ask the Court to prevent the company from enforcing their statutory remedy of cutting off the supply when we have not committed that default which entitles them to exercise it. In *Weale* v. *West Middlesex Waterworks Company* (3) there was nothing in the Act which compelled the person to take or the company to give a supply of water. Here we did take the supply, and a person who has once taken is a person entitled to demand a supply on payment or tender.

[In answer to *Chitty*, J., *R. S. Wright*, on behalf of the company, offered, without prejudice to any question, to undertake not to cut off; but *Romer*, Q.C., declined to give an undertaking to proceed before the justices, though willing to undertake to speed any application the company might make, and to appear at once.]

(1) 13 Ch. D. 498. (2) 15 Ch. D. 501.
(3) 1 Jac. & W. 358.

CHITTY, J., after stating the facts, proceeded:—

A *bonâ fide* dispute has arisen and still subsists between the Plaintiff and the Defendant company as to the basis on which the rate ought to be calculated. It is admitted on both sides that the effect of the statutes bearing on the question is that the only tribunal by which such a dispute can be settled is that mentioned in the 68th section of the general Act. That section enacts that "if any dispute arise as to such value the same shall be determined by two justices;" and in the *New River Company* v. *Mather* (1) it was held that this statutory tribunal had exclusive jurisdiction on the question of value, and that no action could be maintained by the water company for the rate unless (where a *bonâ fide* dispute existed at the commencement of the action) the value had been first ascertained by the justices. The Plaintiff before the writ was issued tendered to the company the full amount payable, according to his contention as to value, for the rate up to Christmas, the tender being for the rate in advance. The company refused to accept the amount and threatened to exercise the power conferred on them by sect. 74, and to stop the water supply. [His Lordship, after stating that section, proceeded:—]

The Defendants threaten to cut off the supply to the Plaintiff's houses unless the full amount claimed by them for the rate in advance up to Christmas is forthwith paid. The houses are separate tenements, and the amount claimed by the company in respect of each house is less than £20. The Plaintiff has offered to pay and has paid into Court in this action the full amount claimed by the Defendants up to Christmas. Neither the Plaintiff nor the Defendants have taken any proceedings before the justices to have the dispute as to value determined by them. For some reason which has not been stated to me, neither party is willing to take the initiative. The Plaintiff, by his counsel at the Bar, while not contesting that the Plaintiff can initiate the proceedings, has declined to give any undertaking to take any proceedings before the justices, contending that it is the duty of the Defendants to take proceedings before putting in force their power to cut off the water. But the Plaintiff's counsel

(1) Law Rep. 10 C. P. 442.

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has not even stated any ground for this contention beyond citing some passages from the judgment of the Court of Common Pleas in *New River Company* v. *Mather* (1). All that the Court decided in that case was that before the company could sue they must get the dispute as to value determined. It did not decide that it was the duty of the company to obtain the settlement of the dispute in all cases. In these circumstances the question is whether the Plaintiff is entitled to an injunction to restrain the Defendants from cutting off the water. The writ asked for an injunction without limit of time. But the only injunction that could be granted in the existing circumstances would be up to Christmas. It was argued by the company that the Plaintiff's right to the supply of water was a statutory right, and that the only remedies open to the Plaintiff were those given by the statutes which conferred the right, and that the statutes conferred a special remedy by penalty payable to the person aggrieved when the water was cut off. As at present advised, I should, if it were necessary to decide the question, decline to adopt this argument. I see no reason why the Court should refuse to protect a right by injunction merely because it is a statutory right. In *Cooper* v. *Whittingham* (2) Sir *George Jessel* held, that the ancillary remedy by injunction ought to be granted, although the statute had created a new offence and imposed a penalty, and in his judgment he referred to the *Judicature Act*, 1873, sect. 25, sub-sect. 8, enabling the Court to grant an injunction in all cases in which it shall appear to be just or convenient, and stated his opinion to be that this enactment might be said to be a general supplement to all Acts of Parliament. Sir *George Jessel* gave a wider interpretation to the enactment than has since been adopted by the Court of Appeal. But the Court of Appeal did not in *North London Railway Company* v. *Great Northern Railway Company* (3) overrule the decision in *Cooper* v. *Whittingham*, or lay down any principle inconsistent with that upon which the case was decided. Before the passing of the statutes conferring on the Court of Chancery jurisdiction to determine questions of legal right, it was the constant practice of the

(1) Law Rep. 10 C. P. 442. (2) 15 Ch. D. 501.
(3) 11 Q. B. D. 30.

Chancery Court to intervene by injunction in proper cases for the protection of the plaintiff in equity pending the trial of the legal right and until that right could be determined at law. But the intervention was temporary, and the Court required that proceedings should be taken to obtain the decision at law. It seems to me that the principle involved in that practice would apply to the present case. It was argued for the Defendants that the damage to the Plaintiff by cutting off the water would not be irreparable. But I am satisfied that that argument by itself could not prevail. The supply of water to the inhabitants of *London* now depends almost entirely on the water companies, and in the present case there are no less than 150 persons dwelling in the Plaintiff's houses. I should have no hesitation in saying that the cutting off the supply of water for domestic purposes would be damage of that grievous nature that would have fallen within the principle of the decisions of the Court of Chancery as to irreparable damage before the passing of the *Judicature Act*, and that, at all events, it would fall within the *Judicature Act*, 1873, sect. 25, sub-sect. 8.

The unreported decision of the late Master of the Rolls in *Low* v. *Lambeth Waterworks Company* is distinguishable from the present case. There an attempt was made by means of a mandatory injunction to obtain specific performance of the statutory contract for the supply of water. Necessarily such an application failed. The case is distinguishable on that ground from the one before me, and also—so far as the limited injunction is concerned, which I have referred to as the only one which I should grant—it is distinguishable, because that case was decided before the *Judicature Act* of 1875 was in operation. Still, I think no injunction ought to be granted. It would be neither just nor convenient to grant an injunction except pending proceedings for the settlement of the dispute as to value, or upon an undertaking by the Plaintiff to commence the proceedings within a short period. The question whether the company is entitled to cut off the water depends entirely on the question whether the sum tendered is sufficient or not. The Defendants are, if they are right in their contention as to value, entitled to have the sum claimed by them paid in advance. The Plaintiff having refused

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to give any undertaking to proceed before the justices, and having failed to shew any reason why the company ought to be compelled to take the initiative, I refuse the motion with costs.

The company subsequently gave an undertaking not to cut off the supply for a fortnight, it being uncertain whether the Plaintiff desired to proceed further or to take proceedings before the magistrate.

Solicitors: *Hollingsworth, Tyerman, & Co.; Bircham & Co.*

F. G. A. W.

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Nov. 22, 29.

CROPPER *v.* SMITH. (No. 2.)

[1881 C. 2207.]

Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19—*Application for Leave to amend Specification by way of Disclaimer—Appeal to the House of Lords in Action relating to the Patent, after Application for Leave to amend—"Action for Infringement"—Pending Action—"Other Legal Proceeding"—Revocation of Patent.*

In an action for infringement of their patent, the Plaintiffs obtained a judgment against the Defendants *S.* & *H.*, but on appeal, that judgment was reversed as against *S.*, but maintained as against *H.* (1). The Plaintiffs afterwards applied under the *Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 Vict. c. 57), s. 18, for leave to amend their specification by way of disclaimer, which application was opposed by the Defendants. Subsequently, *H.* lodged an appeal in the House of Lords against the decision of the Court of Appeal. The Comptroller-General then declined to proceed with the Plaintiffs' application until the opinion of the Court had been taken under sect. 19 of the Act, as he doubted whether or not the appeal to the House of Lords was a pending litigation within sect. 18, sub-sect. 10 of the Act, and the Plaintiffs thereupon took out a summons that they might be at liberty to disclaim:—

Held, that the words "other legal proceeding in relation to a patent," in sect. 18, sub-sect. 10, refer to a proceeding for the revocation of a patent, and that an "action for infringement . . . . pending" means an action before judgment, and that being so there was no action for infringement or other legal proceeding pending, and the summons was dismissed.

IN 1873, letters patent were granted to the Defendant *Hancock*, who in 1877 went into liquidation, and the patent was purchased by the Plaintiffs of his trustee.

(1) 26 Ch. D. 700.

Hancock afterwards went into partnership with *Smith*, and in 1881 an action for infringement of the letters patent was commenced by the Plaintiffs against *Smith & Hancock*. On the trial of the action judgment was given for the Plaintiffs. Subsequently the Court of Appeal reversed the judgment as against *Smith*, on the ground that the patent was invalid, but sustained it as against *Hancock*, as he had not delivered any particulars of objections to the patent (1).

The Plaintiffs then applied at the Patent Office for leave to file a disclaimer under sect. 18 of the *Patents, Designs, and Trade-marks Act*, 1883, which application was opposed by the Defendants.

Subsequently to this application at the Patent Office, the Defendant *Hancock* appealed to the House of Lords.

The Comptroller-General feeling a doubt whether the appeal to the House of Lords did or did not constitute a pending proceeding within the meaning of sects. 18 & 19 of the Act, declined to proceed upon the Plaintiffs' application until leave of the Court had been obtained under sect. 19.

The Plaintiffs accordingly took out a summons which was adjourned into Court, and was an application on the part of the Plaintiffs (made in pursuance of a direction of the Comptroller-General of Patents, Designs, and Trade-marks, given by him on the 7th of August, 1884, in the matter of the application made by *John Cropper*, *Henry Smith Cropper*, and *Samuel Thacker*, for leave to amend the specification filed in pursuance of the letters patent No. 2672 of 1873, that if it is considered that this action is still pending within the meaning of the 19th section of the *Patents, Designs, and Trade-marks Act*, 1883, the applicants may be at liberty to apply at the Patent Office (as on the 29th of April, 1884, being the date of the application hereinbefore referred to), for leave to amend the specification filed in pursuance of the letters patent No. 2672 of 1873, by way of disclaimer."

Romer, Q.C., *Chadwyck Healey*, and *Cann*, for the Plaintiffs, contended that there were no pending proceedings within the

(1) 26 Ch. D. 700.

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meaning of the Act, and that the Court therefore had no jurisdiction in the matter, and ought to refuse the application.

They referred to *Singer* v. *Stassen* (1), and *In the Matter of Codd's Patent* (2).

Aston, Q.C., *Webster*, Q.C., and *Goodeve*, for the Defendants:—

There are now pending proceedings, but the Act does not provide for the case. The term the "Court" in sect. 19, means the High Court, beyond whose jurisdiction the matter now is, and therefore the Plaintiffs cannot proceed at all. If, however, the Court gives the leave asked for, terms must be imposed.

CHITTY, J.:—

This is an application on the part of the Plaintiffs, who are the owners of a patent, for leave to amend the specification. The application is made under the 19th section of the *Patents, Designs, and Trade-marks Act*, 1883, but the Plaintiffs themselves say that the leave of the Court is not required, and what they really desire is by means of this summons to obtain an adjudication with regard to a doubt or question which has been raised by the Comptroller. The Comptroller suggests that it is doubtful whether he has any power to entertain an application for the amendment of the specification by reason of the provisions of sub-section 10 of the 18th section of the above Act, the 18th section being that which gives him power as to amendments. Sub-sect. 10 is this: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending." The corresponding enactment with that is the enactment contained in the 19th section; and I think that the two must be read together in order to ascertain the true intention of the Legislature. The state of proceedings in the action is this. In the first instance, the action was assigned to me; then it was transferred to Mr. Justice *Pearson* for trial, Mr. Justice *Pearson* pronounced a judgment, and from that there was an appeal, and the Court of Appeal have disposed of the appeal finally, holding that there

(1) Reports of Patent Cases, p. 121. (2) Reports of Patent Cases, p. 209.

should be an injunction against one of the Defendants and no injunction against the other; and holding at the same time, strange to say—but the reasoning when the case is worked out is not difficult to follow—that the patent is invalid, but that one of the Defendants has not put his case in such a form as to be able to raise properly the question of invalidity. From that judgment of the Court of Appeal there is now pending an appeal to the House of Lords, and the pending appeal to the House of Lords gives rise to the Comptroller's doubt. The important words, as I have said, are "action for infringement." The words "other legal proceeding in relation to a patent," are intended evidently to refer to a proceeding for the revocation of a patent. I say that because I consider, as I have already stated, the 19th section to be correlative. The 19th section is in these words: "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a Judge" (and turning to the 117th section of the Act I find "the Court" means "Her Majesty's High Court of Justice") "may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a Judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed." It appears to me that, reading the 10th sub-section of sect. 18 and that section together, bearing in mind also the 20th section which I need not read at length, the result is this, that "pending action" means an action before judgment, because if the amendment takes place after judgment it is quite clear that it is not available for any purpose of the action. If it is an ordinary judgment in the Queen's Bench Division and damages were awarded there is an end of it. If, on the other hand, instead of damages being awarded there is an injunction and an account, then the account is taken, but the account is taken on the footing of course of the patent, but still in an action such as this, where there is no account and no judgment (there is no account at any rate directed), I am quite clear that any amendment which is now being made of the specification could not be made use of to the detriment of the parties to the action. Mr. *Goodeve* who argued first, and Mr. *Webster* who followed him,

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both insisted that the 19th section had the construction that I am putting upon it, and they insisted that the words "May direct that in the meantime the trial or hearing of the action shall be postponed" shew that the meaning of the Legislature was that the power which is conferred on the Court or a Judge was shewn to be a power which must be exercised before the trial of the action. I think, on considering the matter and reading the sections of the Act together, that is right, and the result therefore is that this application fails.

I see what the kind of argument which has been adduced on the part of the Respondents is. First, they did not appear; they thought it was not necessary to appear. Then Mr. *Aston* intervened as *amicus curiæ* to assist the Court and made some observations. The result was that he was suddenly retained as counsel, and then he asked for the matter to stand over in order that he might consider his argument. He is now engaged elsewhere, but the argument has been presented by able counsel in his stead. The suggestion is, first, that there is a power in the 19th section, and that that power is not exercisable by the Court or a Judge according to the definition—that is, the High Court or a Judge of the High Court, but that the application must be taken to the Court of Appeal. It seems to me, if the application were to be taken to the Court of Appeal it would be refused at once. Then it is said it must be taken to the House of Lords because there the appeal is pending. It seems to me it would be refused on the ground that the House of Lords have no jurisdiction to act upon it. The meaning of all that is this, as I discovered in the course of the argument, that there is no power to give the leave; but that is the very argument which is adopted on behalf of those who are making the application, and this is only another curious incident in these proceedings; because here the applicant makes an application which he says is wrong and asks for the opinion of the Court, in order that the comptroller may know whether he can proceed or not. I think, for the reasons that I have given, I ought to refuse the application, but in doing that I ought to state my opinion that there is no pending action. Then as to costs, I will not give the Plaintiffs their costs because they have succeeded through their failure. I will not give the Respondents their

costs because I think they might as well not have come here at all. They have failed substantially. They have failed through their success, whereas the applicants have succeeded through their failure.

Solicitors: *Frith Needham*, agent for *Cann & Son, Nottingham; Marsland & Co.*, agents for *Everall & Jarman, Nottingham.*

G. M.

In re NORTHEN'S ESTATE. SALT *v.* PYM.

[1884 N. 9.]

Will — Clerical Error in Description — Correction by Reference to Context — Manifest Absurdity or Incongruity.

A clerical error may be corrected where, if uncorrected, it makes the will absurd, and the proper correction can be gathered from the context.

A testator devised an estate called *Lea Knowl* to trustees upon trusts for the benefit of his daughter *W.*, her husband and children, and empowered his trustees, at the request of his daughter *W.*, to sell the estate and stand possessed of the sale moneys upon the trusts thereinbefore declared "concerning the said *Lea Knowl* estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect." He then devised an estate called *Croxton* to trustees upon similar trusts for the benefit of his daughter *C.*, her husband and children, and empowered his trustees, at the request of his daughter *C.*, to sell the last-mentioned devised hereditaments and stand possessed of the sale moneys, "in trust for such person and persons, and for such estates, ends, intents and purposes, powers, provisoes, and conditions as are hereinbefore limited, expressed, and declared, of and concerning the said *Lea Knowl* estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect":—

Held, that the words "the said *Lea Knowl* estate," in the trusts of the moneys to arise from the sale of the *Croxton* estate had been inserted in the will through an obvious error; that to read the words "the said *Lea Knowl* estate," literally and grammatically, would be making the will lead to a manifest absurdity or incongruity, and that the will must be read as if the words "the said *Croxton* estate," were inserted in the place of the words "the said *Lea Knowl* estate," in the trusts of the moneys to arise from the sale of the *Croxton* estate.

ADJOURNED SUMMONS.

Francis Hicken Northen, by his will dated the 22nd of October,

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1844, after making various pecuniary and specific bequests, devised a copyhold farm called *Lea Knowl* to trustees upon trust to pay the rents, issues, and profits to such person and persons as his daughter, *Mary Ann Wilson*, during her life should appoint, and in default thereof to her for her separate use, and after her death to her husband *Edward Wilson* for life, and after the decease of the survivor, in trust for all the children of *Mary Ann Wilson*, and their respective heirs and assigns as tenants in common, and if there should be but one such child, then in trust for such only child his or her heirs and assigns, and if there should be no such child who should live to attain the age of twenty-one years, then in trust for such person and persons, and for such estate and estates, intents, and purposes as *Mary Ann Wilson* should by her last will and testament appoint or devise, and in default thereof in trust for *Mary Ann Wilson*, her heirs and assigns for ever. And the testator empowered his trustees "at any time when thereto required in writing by my said daughter *Mary Ann Wilson* during her life, and after her death at the like request of her children, if more than one, and if only one, at the request of that one to sell and dispose of the said last-mentioned devised hereditaments," and invest the moneys arising from the sale as therein mentioned, and stand possessed thereof "in trust for such person and persons, and for such estates, ends, intents and purposes, powers, provisions, and conditions, as are hereinbefore limited, expressed, and declared of and concerning the said *Lea Knowl* estate hereby devised, as to (*sic*) such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect."

The testator then devised a copyhold farm called *Croxton*, to his trustees upon trusts in favour of his daughter *Ellen Colt*, her husband and children, which trusts were in all respects similar to the trusts above-mentioned of the *Lea Knowl* estate, in favour of *Mary Ann Wilson*, her husband and children. And the testator then empowered his trustees "at any time when thereto required in writing by my said daughter *Ellen Colt* during her life, and after her death, at the like request of her children if more than one, and if only one, at the request of that one, to sell the last-mentioned devised hereditaments," and invest the

moneys arising from the sale as therein-mentioned, and stand possessed thereof "in trust for such person and persons, and for such estates, ends, intents, and purposes, powers, provisions, and conditions as are hereinbefore limited, expressed, and declared of and concerning the said *Lea Knowl* estate hereby devised, as to (*sic*) such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect." And the testator made provision for his two other daughters and their families, as stated in the judgment.

The testator died in 1861. In 1868 the *Croxton* estate was sold with the written consent of *Ellen Colt*, then Lady *Colt*, and the proceeds of sale were invested in the names of trustees in the sum of £729 reduced annuities, the dividends on which were paid to Lady *Colt* during her life, and afterwards to her husband, who died in 1882.

The trustees of the settlement of Mrs. *Haynes*, who was the only child of Lady *Colt* claiming the fund, this summons was taken out to determine the rights of the parties under the testator's will.

Ingle Joyce, for the trustees of the testator's will.

E. Beaumont, for the Defendants, the trustees of Mrs. *Haynes*' settlement:—

In the trusts of the moneys to arise from the sale of the *Croxton* estate, the words "the said *Lea Knowl* estate," have crept in by an error. The testator could not have intended, after limiting the *Croxton* estate to Lady *Colt*, her husband and children, and after empowering a sale at the request of Lady *Colt*, that the moneys to arise from the sale should be held upon the same trusts as the *Lea Knowl* estate, and the sale moneys of that estate. It is a palpable error which, unless corrected by the Court, would lead to an obvious absurdity.

The mere letter of the will is not to be adhered to if a contrary signification can be suggested by the whole context of the instrument. The spirit is to prevail, and the letter is not to be allowed to kill: *In re Redfern* (1).

(1) 6 Ch. D. 133.

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He also referred to *Key* v. *Key* (1), *Rhodes* v. *Rhodes* (2), and *Bashford* v. *Chaplin* (before Mr. Justice *Fry*, July 26th, 1881).

C. Howard, for Mrs. *Wilson* and her family.

CHITTY, J.:—

The question in this case is with reference to the words, "the said *Lea Knowl* estate," which occur in the trusts of the moneys to arise from the sale of the *Croxton* estate. The will is so framed that, taking it literally and grammatically, on the sale of the *Croxton* estate the proceeds of the sale are not to be held in trust for the persons who take the *Croxton* estate beneficially, but for the persons who take the *Lea Knowl* estate. That is on the face of it somewhat surprising.

Now the testator had four daughters; and he seems to have made an apportionment of his property which, on the facts before me, seems to have been something like an equal apportionment among his four daughters. One was dead. She had a settlement. The testator left a legacy of £2500 to the trustees of her settlement; and to the trustees of the settlement of Mrs. *Wilson*, another daughter, he gave £2500, but directed that out of that sum £500 should go to his daughter, Lady *Colt*, to be paid without interest at the end of two years. Then he gave a legacy to Lady *Colt* of £2500, to which there is to be added the £500—to Lady *Colt's* husband he makes a gift, in the shape of a forgiveness of a debt of £500. Having two estates, of which *Lea Knowl* appears to be the principal one, he makes a settlement of the *Lea Knowl* estate upon Mrs. *Wilson* in this way—she takes the first life interest; then her husband takes an interest for life; then there is a limitation to her children; and, in default of children, she has a testamentary power of appointment; and, in default of the exercise of that power, it passes to her in fee simple. In regard to the *Lea Knowl* estate there is a power of sale which is exercisable on the request of Mrs. *Wilson;* and the power of sale directs that the moneys to arise from the sale shall be held upon the same trusts as those declared concerning the estate itself—that is the *Lea Knowl* estate. There is no question arising upon

(1) 4 D. M. & G. 73. (2) 7 App. Cas. 192.

that. There is a power of sale exercisable upon the request of the first tenant for life. I may mention incidentally that the power of sale extends after the death of the tenant for life.

Then I come to the limitations of the *Croxton* estate, which appears to be a small property of the value of £700 or £800. That estate has been sold at the request of Lady *Colt* for about £729. The limitations of the *Croxton* estate are identical with the limitations of the *Lea Knowl* estate, with the exception that the *Croxton* estate is settled upon Lady *Colt*, her husband, and her children, and her testamentary appointees; and, in default of appointment, on herself in fee simple. The power of sale is expressed in identically the same words, with the sole distinction that, in regard to the power of sale of the *Croxton* estate, it is to be made during the lifetime of Lady *Colt* on her request. The only difference between the limitations of the *Croxton* estate and the *Lea Knowl* estate consists in a proviso cutting down the interest of Mrs. *Wilson's* husband to one moiety in the event of second marriage.

Now the question is, whether the words "*Lea Knowl* estate," in the trust of the moneys as to the sale of the *Croxton* estate, are not a plain and palpable blunder? The rule of construction which appears applicable to this case is that which is laid down by Lord *Cranworth* in *Thellusson* v. *Lord Rendlesham* (1). He says (2): "The rule on which the Appellant relies is that universally recognised and acted on, namely, that words are to be construed according to their plain ordinary meaning, unless the context shews them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity." That statement of the law by Lord *Cranworth* has often been cited with approval. If I read these words, "the said *Lea Knowl* estate" literally and grammatically, I should be making the testator's will lead to a manifest absurdity or incongruity. It is manifestly incongruous to say, for no reason at all that can be discovered on the face of the will, that, on a sale at the request of the tenant for life of the *Croxton* estate, the purchase-money is to shift over, and that in the face of a will which carefully limits the *Lea Knowl* property to the *Wilson* family, and the

(1) 7 H. L. C. 429.

(2) 7 H. L. C. 494.

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Croxton property to Lady *Colt*, and her husband and children. That is so manifest an absurdity that I think the context enables me to correct that which is an obvious error. I think it is plain how that error arose. When the two powers of sale, and the trust for the purchase-moneys are read, it is found that they are identical, subject to the slight difference which I have mentioned, namely, the substitution of Lady *Colt* for Mrs. *Wilson*, including the grammatical mistake which occurs towards the end of the trust in each case. It is plain that there has been a slip in the copying of the clause relating to the trusts of the moneys to arise from the sale of the *Lea Knowl* estate in the trusts of the moneys to arise from the sale of the *Croxton* estate. It appears to me to be so plain and obvious that the testator did not intend to defeat the interests of Lady *Colt*, her husband, and children by means of a sale, which would be a most palpably absurd conclusion—I say it seems to me so obvious that he did not intend that, that I think I can read the words "the said *Lea Knowl* estate" as equivalent to "the said *Croxton* estate," or, in other words, the estate which is limited to Lady *Colt*, her husband and children.

Solicitors: *Thomas White & Sons*, agents for *Hand, Blakiston, Everett, & Hand, Stafford; Finch, Jennings, & Finch; Ford & Ford.*

G. M.

HURST *v.* HURST.

PEARSON, J.

1884

Dec. 1.

[1872 H. 245.]

Administration of Assets—Costs—Order of Application of different Funds—Descended Real Estate—Interest accruing to Heir by Reason of Forfeiture under Provisions of Will.

Real estate which had descended to a testator's heir-at-law, not because it was not originally disposed of by the will, but by reason of a subsequent forfeiture by the devisee under the provisions of the will, *held* not liable to pay the costs of an action to administer the testator's estate in priority to specifically devised and bequeathed freehold and leasehold estate.

Scott v. *Cumberland* (1), *Gowan* v. *Broughton* (2), and *Row* v. *Row* (3) distinguished.

FURTHER CONSIDERATION.

Isaac Blackburn Hurst, by his will dated the 23rd of September, 1867, gave, devised and bequeathed all his freehold and leasehold property whatsoever unto his executors and trustees thereinafter appointed, their heirs, executors, administrators and assigns, according to the nature thereof, upon trust to permit his daughter *Margaret Dennant*, the wife of *F. C. Dennant*, to receive the rents and profits of certain specified freehold and leasehold houses, to and for her sole and separate use during her life, and after her decease upon trust that his said executors and trustees should convey and assign the said freehold and leasehold houses to the children of his daughter *Margaret Dennant*, in equal shares absolutely, on their respectively attaining twenty-one; but, in case any of the said children should not live to attain that age, then upon trust to convey and assign the share of the child so dying under the age of twenty-one to the others or other of them. And upon further trust to permit the testator's son *Isaac Blackburn Hurst* to receive the rents and profits of certain other freehold and leasehold houses, to and for his own use and benefit during his life, and after his decease upon trust that the testator's executors and trustees should convey and assign the said freehold and leasehold houses unto the children of his son *I. B. Hurst*, in

(1) Law Rep. 18 Eq. 578. (2) Law Rep. 19 Eq. 77.
(3) Law Rep. 7 Eq. 414.

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equal shares absolutely, on their respectively attaining the age of twenty-one, but, in case any of the children of his said son should die before attaining that age, then upon further trust to convey and assign the shares or share of the children or child so dying under twenty-one to the others or other of such children; but, if his said son should not have any lawful issue, or in case none of his children should live to attain twenty-one, then it was the testator's will that the said freehold and leasehold property, the rents of which would be receivable by his said son during his life, should be conveyed and assigned by his executors and trustees to and divided equally between such of the children of his daughter *Margaret Dennant* as should live to attain twenty-one. And the testator gave and bequeathed an annuity of £100 per annum to his wife *Augusta Matilda Hurst*, in bar of dower or freebench, during her life or so long as she should continue his widow, such annuity to be charged upon and payable out of the rents and profits of the whole of his freehold and leasehold property, one moiety thereof to be paid by his son *I. B. Hurst* out of the rents and profits receivable by him during his life, and the other moiety to be paid by his daughter *Margaret Dennant* out of the rents and profits receivable by her during her life. And the testator declared that the bequests thereinbefore made to his son and daughter respectively should be subject to the following conditions, viz., that they should in no wise charge or incumber the said freehold and leasehold property the rents of which were receivable by them during their respective lives, or any part thereof; and in case either his son or daughter should so charge or incumber the said property, or any part thereof, then the bequest to his son or daughter so transgressing such conditions as aforesaid should thereupon become absolutely forfeited, and in either of such cases the trust thereinbefore created in favour of the child or children of his said son or daughter so transgressing should at once take effect and be acted upon by his said executors and trustees as thereinbefore directed. And as to all the rest and residue of his personal estate and effects of what nature or kind soever the testator gave and bequeathed the same unto his said wife and son and daughter, in equal shares. The will did not contain any residuary devise of real estate. And the testator

appointed his wife and *J. W. Hurst* executors and trustees of his will. The testator died on the 2nd of October, 1867. His wife and his son and daughter survived him. The son was the testator's heir-at-law. On the 2nd of November, 1872, a bill was filed in the Court of Chancery, by *J. W. Hurst* against the widow, for the administration of the testator's estate, and the execution of the trusts of his will, and on the 23rd of November, 1872, an administration decree was made, which directed an inquiry (*inter alia*) whether *Margaret Dennant* or *I. B. Hurst* (the son), or either of them, had charged or incumbered the freehold or leasehold property of the testator, or any part thereof. It was afterwards discovered that *I. B. Hurst* (the son) had in some way incumbered his life interest under the will, and that the trustees of the *Birkbeck Benefit Building Society* were in receipt of the rents and profits of the property which was given by the will in trust for the son during his life, and on the 23rd of June, 1873, an order was made in the suit that the Plaintiff and the Defendant (the trustees of the will) should be at liberty to file a supplemental bill against the building society for an account to be taken of the rents and profits of the property devised and bequeathed to the son, on the ground that a mortgage executed by him was *ultrà vires* according to an express stipulation contained in the will.

In pursuance of this order a supplemental bill was on the 24th of January, 1874, filed by *J. W. Hurst* against the widow, *I. B. Hurst* (the son), *E. C. Mulkern* and *J. Runtz* (the trustees of the building society), *R. A. Ward* and *Charles Sidgreaves*. In this supplemental suit the following facts were ascertained. On the 30th of September, 1869, in order to secure a sum of £100 advanced by the Defendant *Ward* to the Defendant *I. B. Hurst* (the son), the son executed a memorandum charging with the payment thereof all his interest and estate in all the freehold houses given to him for life by the will of his father. By his answer in this suit the Defendant *Ward* said that he had been advised that the effect of the charge of the 30th of September, 1869, was to produce a forfeiture of the life estate of the son, and the Defendant accordingly disclaimed his interest under the charge. On the 13th of July, 1870, the son executed an inden-

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ture of lease, by which he demised all the freehold and leasehold houses, to the rents of which he was under the will entitled for his life, to the Defendant *Sidgreaves*, for the term of twenty-one years at the yearly rent of £126, subject to the lessee's covenants therein contained. On the 26th of August, 1870, the Defendant *Sidgreaves* demised all the premises comprised in the lease of the 13th of July, 1870, to the Defendants *Mulkern* and *Runtz* (as trustees of the building society), for the residue of his term of twenty-one years (less the last three days thereof), by way of mortgage.

The supplemental bill prayed a declaration that the charge created, or purported to be created, by the son on his life interest under the will in favour of the Defendant *Ward* was wholly inoperative as a charge or incumbrance, and that the same determined the life interest of the son, and accelerated the trusts under the will expectant on the determination of the life estate in favour of the children (if any) of the son, and, if none, in favour of the children of the daughter *Margaret Dennant*, and that the lease to the Defendant *Sidgreaves*, and the mortgage by him to the Defendants *Mulkern* and *Runtz*, were equally inoperative. And the bill prayed for an injunction to restrain the Defendants *Mulkern* and *Runtz* from receiving the rents, and that an account might be taken of the rents and profits received by them. The daughter *Margaret Dennant* had children; the son *I. B. Hurst* was unmarried. The daughter died on the 30th of May, 1874, having previously incumbered her life interest under the will. The Plaintiff *J. W. Hurst* died on the 29th of December, 1875, and the widow of the testator was, by an order dated the 2nd of November, 1876, substituted as Plaintiff. The children of *Margaret Dennant* were then made Defendants to the original suit. The supplemental suit was tried by Mr. Justice *Fry* on the 7th of February, 1882, when he gave liberty to the Plaintiff to amend the pleadings by striking out the name of the Defendant *Sidgreaves*, who did not appear; and his Lordship (1) gave judgment, declaring that, on the execution of the charge of the 30th of September, 1869, the life estate of the son under the will ceased. And the Court, being of opinion that in that cause

(1) 21 Ch. D. 278.

it was not competent to the Court to determine the rights of the persons interested in the property except as aforesaid, ordered the action to be dismissed as against the son and the Defendant *Ward* without costs, and as against the Defendants *Mulkern* and *Runtz* with costs.

The Plaintiff appealed from this judgment, so far as it ordered the cause to be dismissed as against the Defendants *I. B. Hurst* and *Ward* without costs, and as against the Defendants *Mulkern* and *Runtz* with costs. And the Defendants *Mulkern* and *Runtz* appealed from the declaration that the execution of the charge of the 30th of September, 1869, operated as a forfeiture of the son's life interest. The Court of Appeal held (1) that, there being no residuary devise in the will, the interest given to the son for his life in the freehold houses went, on the execution of the charge of the 30th of September, 1869, to himself as heir-at-law of the testator, without prejudice to the right of his children (if he should have any), and that consequently the trustees of the building society were entitled to the rents of those houses under their mortgage. But, as to the rents of the leasehold houses, the Court held that they passed under the residuary bequest to the Plaintiff, as executrix, for the benefit of the persons entitled under that bequest, in case they should not be required for costs, and that consequently the trustees of the building society would be entitled to one-third of those rents under their mortgage, if they should not be required for costs. The judgment of Mr. Justice *Fry*, so far as it ordered the dismissal of the bill as against the trustees without costs was discharged; and it was ordered that so much of the bill as sought relief in respect of the freehold property should be dismissed. And it was ordered that the Defendants *Mulkern* and *Runtz* should be perpetually restrained from continuing in the receipt of the rents of the leaseholds; and that an account should be taken of the rents of the leaseholds received by them, and in taking the account the Chief Clerk was to certify the amount of two-thirds thereof; and it was ordered that the Defendants *Mulkern* and *Runtz* should pay to the Plaintiff the amount of rents so certified, and the Plaintiff was to be at liberty to apply in Chambers as to the remaining one-third of such rents if required

(1) 21 Ch. D. 292.

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for administration purposes. And it was ordered that the Defendants *Mulkern* and *Runtz* and *I. B. Hurst* should jointly and severally pay to the Plaintiff her costs of her appeal, and that the Defendants *Mulkern* and *Runtz* should pay to the Plaintiff her costs of their cross appeal, and as to the costs of the appeal, as between the Defendants *Mulkern* and *Runtz*, on the one hand, and the Defendant *I. B. Hurst*, on the other hand, those costs were to be borne in equal moieties. And the Court declared that the Defendants *Mulkern* and *Runtz* were entitled to have a charge on the share of the Defendant *I. B. Hurst* in the testator's property for any costs of the appeal which they might be required to pay under the order in excess of their moiety.

The suit and the supplemental suit now came on for further consideration. The Chief Clerk by his certificate found that the only outstanding personal estate of the testator not specifically bequeathed was a sum of £18 11*s.* 6*d.*, the balance found due from the widow as executrix, and a sum of £60 in her hands, which she had received from the building society, under a compromise which had been sanctioned by the Court, in satisfaction of the amount due from them under the order of the Court of Appeal in respect of rents of the leaseholds which they had received by virtue of their mortgage. The only freehold and leasehold estates of the testator were those which were by the will devised and bequeathed to his son and daughter respectively, and their respective children.

Cookson, Q.C., and *E. Beaumont*, for the Plaintiff:—

The only question of importance is how the costs of the suit are to be borne, the personal estate being insufficient. The rule is well settled that the costs of an administration suit are payable out of different funds in the following order: (1) personal estate, (2) descended real estate, (3) specifically devised and bequeathed freehold and leasehold estates rateably. The trustees of the building society should have no costs, because they have partly succeeded and partly failed. As to the other costs, the interest which the son has forfeited, being descended real estate, is liable to pay them in priority to the other freehold and leasehold estates of the testator.

Everitt, Q.C., and *Ashton Cross*, for the trustees of the building society:—

The trustees ought to have their costs of the supplemental suit. It was a serious question whether a forfeiture had taken place. We had to pay the costs of the appeal, because we had contended for too much; in the rest of our contention we were right. We were necessary parties to the action, and the forfeiture did not arise out of any dealing with us.

The action was brought to administer the trusts affecting all the real and leasehold estates; why should the costs be thrown in priority on that part of the specifically devised real estates which happens, in consequence of a forfeiture accruing since the testator's death, to be undisposed of? The costs ought to be thrown rateably on the *corpus* of all the specifically devised and bequeathed freehold and leasehold estates.

[*Cookson*, Q.C., referred to *Scott* v. *Cumberland* (1).]

That case does not apply; there the suit was for general administration; here it is for the execution of specific trusts.

[PEARSON, J., referred to *Eyre* v. *Marsden* (2).]

In *Morgan & Wurtzburg* on Costs (3), after referring to *Maddison* v. *Pye* (4) and *Bagot* v. *Legge* (5), it is said: "In this conflict of authority, it is difficult to discover a principle; but it is submitted that the true principle is that followed in *Maddison* v. *Pye* and *Bagot* v. *Legge*. There is no such thing as a residue of real estate, properly so called, and the devisee has no equity to charge the heir with the whole expenses of administering the devised as well as the descended estates." *In re Jones* (6) does not touch the present point. *Scott* v. *Cumberland* was not the case of a specific devise, but the decision was that a lapsed share of residuary real estate was liable to costs in priority to devised real estate. In *Gowan* v. *Broughton* (7) *Malins*, V.C., applied his own previous decision in *Scott* v. *Cumberland* to a lapsed share of residuary personalty, but the decision in *Gowan*

(1) Law Rep. 18 Eq. 578.
(2) 4 My. & Cr. 231, 243–246.
(3) 2nd Ed. p. 176.
(4) 32 Beav. 658.
(5) 2 Dr. & Sm. 259.
(6) 10 Ch. D. 40.
(7) Law Rep. 19 Eq. 77.

PEARSON, J. v. *Broughton* (1) has been since disapproved: *Trethewy* v. *Helyar* (2); *Fenton* v. *Wills* (3); *Blann* v. *Bell* (4).

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F. Kingsford, for the children of Mrs. *Dennant*:—

I rely on *Scott* v. *Cumberland* (5). At any rate, the suit has not benefited Mrs. *Dennant's* moiety. She was not a party to the supplemental bill, and her moiety ought not to be charged with any costs of that suit.

Cookson, in reply:—

I admit that the costs of the supplemental suit should be severed from the general costs of administration, and that no part of them should be thrown on Mrs. *Dennant's* share.

As to the other point, the testator did not intend his heir, *quâ* heir, to take anything. He takes by an accident.

[PEARSON, J.:—But he takes only that which the devisee loses.]

When a testator gives real estate to a charity he does not intend his heir to take the property, and if the gift fails, and the property goes to the heir, there is no injustice in making it primarily liable to costs. In *Row* v. *Row* (6) a devise of real estate failed for uncertainty, and *James*, V.C., held that that property was liable to the costs of an administration suit in priority to devised real estate.

[PEARSON, J.:—The property was treated as undisposed of by the testator.]

In *Scott* v. *Cumberland* the question was as between real estate undisposed of and personal estate effectually disposed of by the will. Such cases as *Blann* v. *Bell* and *Trethewy* v. *Helyar* do not apply; they relate only to personal estate. The decision in *Maddison* v. *Pye* (7) was based on a misconception of *Eyre* v. *Marsden* (8), which only decided that there is no residue until the estate is cleared of costs.

[PEARSON, J.:—Some passages in Lord *Cottenham's* judgment

(1) Law Rep. 19 Eq. 77.
(2) 4 Ch. D. 53.
(3) 7 Ch. D. 33.
(4) Ibid 382.
(5) Law Rep. 18 Eq. 578.
(6) Ibid. 7 Eq. 414.
(7) 32 Beav. 658.
(8) 4 My. & Cr. 231.

in *Eyre* v. *Marsden* (1) seem to me rather inconsistent with *Row* v. *Row* (2), especially what he says about *Howse* v. *Chapman* (3).]

Suppose that real estate was devised by a testator to his wife for her life or during widowhood, and, in the event of her marrying again, to a charity, then it would descend to the heir upon the widow doing a certain act—marrying again; could it be said that the interest which thus descended to the heir was not descended real estate for the purpose of liability to the costs of an administration action? Can there be any distinction for this purpose between real estate which descends to the heir immediately on the death of the testator, and real estate which descends subsequently by reason of some subsequent act?

[PEARSON, J.:—In the one case the estate goes to the heir because it has never been disposed of by the testator; in the other, it has been disposed of, but by reason of the subsequent act of another person it goes over to the heir.]

The difference is a difference of time only, not of quality.

[PEARSON, J.:—In the latter case the heir takes by way of substitution for another person; in the former he does not.]

The supplemental suit related entirely to the rents of the freehold and leasehold estates, and the costs ought, therefore, to be borne by the rents; primarily by the leasehold rents and next by the rents which have descended to the heir: *In re Middleton* (4); *Patching* v. *Barnett* (5).

Everitt, in reply as to the new cases cited in reply. *Row* v. *Row* was dissented from in *Luckcraft* v. *Pridham* (6). *Howse* v. *Chapman* is very much in point.

Cookson proposed that the trustees of the building society should add their costs to their security, and should also have a charge for them on the life interest of the son, and that the other costs should be paid rateably out of all the freehold and leasehold property, subject, as to the son's life interest, to the mortgage and the charge for costs in favour of the trustees.

(1) 4 My. & Cr. 231.
(2) Law Rep. 7 Eq. 414.
(3) 4 Ves. 542.
(4) 19 Ch. D. 552.
(5) 51 L. J. (Ch.) 74.
(6) 48 Ibid. 636.

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PEARSON, J. (after stating the provisions of the testator's will, and the other facts of the case, continued) :—

It is to be noted that the Court of Appeal, having seisin of the whole case, did not order the trustees of the building society to pay any of the costs in the Court below; the judgment is silent respecting those costs.

The question which has now been argued before me is, how the general costs of all this litigation, which has fortunately now come to an end, are to be paid. The funds available to pay them are, first, an interest given by the will to the son in the leaseholds, which passes under the residuary bequest. There is no other residuary personal estate, except a sum of £60, which represents two-thirds of the rents of the leaseholds, which had been improperly received by the trustees of the building society, and a small balance due from the executrix. Then there is what is called the descended freehold estate, that is, the son's interest in the freehold estates which were devised to him for life, and which has descended on him as heir-at-law, so long as he shall live and have no children; when he dies it goes; and if he has a child it goes. His interest, therefore, is a life interest, dependent upon those two contingencies, his living and his having no children. Subject to that, there remain only the absolute interest in the freeholds and leaseholds devised and bequeathed to the son and his children, and the freeholds and leaseholds given to the daughter and her children. On the part of the Plaintiff it is said that the proper mode of paying the costs of the suit (assuming that all the parties are entitled to have their costs) would be, first, to realize, so far as you can, the interest in the leaseholds which passes under the residuary gift. Secondly, that the shadowy descended freehold interest must then be absorbed, that is to say, all the rents of the freeholds which are devised by the will to the son must, during such time as he shall live and have no children, be impounded and made available to pay the costs; and, after these two sources have been exhausted, the freeholds and leaseholds devised and bequeathed to the son and daughter and their respective children must be assessed *pro ratâ* in order to make good the deficiency.

Now, there being no dispute with regard to the undisposed of

leasehold interest, the first question is this: Is the life interest of that very peculiar character which I have described, and which has come to the son accidentally, to be applied, as descended real estate, in payment of the costs, to be applied absolutely in exoneration of everything else, immediately after the residuary personal estate is exhausted.

A great number of cases have been cited, amongst others, *Scott* v. *Cumberland* (1) and *Gowan* v. *Broughton* (2). I should very much regret if I were compelled to sit in judgment upon those two cases. I say this from personal motives, because I happened to be counsel in both of them, and I know that I was very much dissatisfied with the decisions in both those cases, and I should, therefore, distrust myself exceedingly in expressing an opinion upon those cases, either for them or against them, unless I had so long a period of tranquillity in which to consider them that I could be perfectly satisfied I had come to a conclusion without being influenced by that which I know was weighing upon me at the time when they were decided. But I am not going to express any opinion on either of those cases or any other cases. To my mind, the present case is not like either *Scott* v. *Cumberland* or *Gowan* v. *Broughton*. It is, no doubt, far more like *Row* v. *Row* (3), which was decided by *James*, V.C., but I do not think it is even quite analogous to *Row* v. *Row*. In *Row* v. *Row* there was a devise in the will which was so obscure and so uncertain that it was impossible to affix any meaning to it, and the Court determined that the will must be read as if that devise had not been contained in it. The result was, that so reading the will and striking that devise out of it, there was no devise whatever of the property which the Vice-Chancellor held to be applicable to the payment of the costs.

In the present case, a life interest was given by the will to the son, and a part of that life interest (how much it is impossible to say), has been forfeited. I find it difficult, I may say impossible, to understand how, when a life interest properly given by a will becomes, under the terms of the will, subsequently forfeited, and then by rule of law descends to the testator's heir, the heir

(1) Law Rep. 18 Eq. 578. (2) Law Rep. 19 Eq. 77.
(3) Law Rep. 7 Eq. 414.

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can take anything but exactly that which the tenant for life would have taken, if his life estate had not been forfeited. To my mind he must take either that or nothing, and, as the law says that he takes that which is forfeited, in my opinion he takes it subject exactly to all the conditions and qualifications under which the tenant for life himself held it. That being so, I think the forfeited interest is not absolutely and primarily liable to pay all the costs, but is liable only to pay such a proportion of the costs as it would have been liable to pay if it had remained in the son's possession as tenant for life under the will. I do not, therefore, intend to express any opinion as to what my judgment would be in a case similar to *Row* v. *Row* (1), or in a case similar to *Scott* v. *Cumberland* (2), or *Gowan* v. *Broughton* (3). The present case is different from either of them, and I think that the conclusion to which I have come is certainly in conformity with the whole spirit and tenour of Lord *Cottenham's* judgment in *Eyre* v. *Marsden* (4).

How then ought I to deal with the costs in the present case?

[After referring to the nature of the litigation, his Lordship said, that as the trustees of the building society had partly succeeded and partly failed, and as the Court of Appeal, while ordering them to pay the costs of the appeal, did not order them to pay any costs in the Court below, he thought he ought not to make them pay any costs. His Lordship continued:—] It has been proposed, and I think it will cut the Gordian knot with as much fairness as any other course, that the trustees of the building society should have liberty to add their costs to their mortgage security, and also have a charge for their costs upon the life interest which descended to the son as heir-at-law, in addition to their mortgage. To this I accede; I think it will be a proper order to make.

With regard to the costs of the other parties I felt for some time considerable difficulty in deciding whether all the costs of the litigation ought to be charged upon the son's moiety, or whether they ought to be borne equally by both moieties. I was at one time disposed to think that I ought to charge the costs of

(1) Law Rep. 7 Eq. 414.
(2) Ibid. 18 Eq. 578.
(3) Law Rep. 19 Eq. 77.
(4) 4 My. & Cr. 231.

the supplemental suit simply on the son's moiety and to exonerate the daughter's moiety from any costs in respect of it. But considering that the supplemental bill was filed under an order of the Court to which the daughter was herself a party, and that it was filed really for the benefit of her and her children, because at that time, the son having no children, it was proposed to treat the interest of the daughter and her children as accelerated by the son's forfeiture, I think that all the costs, other than the costs of the trustees of the building society, ought to be charged rateably upon the whole of the testator's freehold and leasehold property, so far as they are not paid by the personal estate. In so charging them I intend expressly to exempt the son's life interest, so long as it shall continue charged in favour of the trustees of the building society, from any charge for the costs, though of course, the Plaintiff will have the benefit of it, when that mortgage and the charge of the trustees for costs shall be satisfied.

Solicitors for Building Society: *Poncione & Leggatt.*
Solicitors for other parties: *Kingsford, Dorman, & Co.*

W. L. C.

In re HARRIS' SETTLED ESTATES.

Petition under Settled Estates Act—Married Woman—Separate Examination—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1.

In the case of a woman married before the commencement of the *Married Women's Property Act*, 1882, sect. 1 of the Act applies only as to property acquired by her after the commencement of the Act.

Therefore, if such a woman is a petitioner, or a respondent to a petition, under the *Settled Estates Act*, 1877, relating to property her interest in which was acquired before the commencement of the Act of 1882, she must be examined separately, as provided by sect. 50 of the Act of 1877.

PETITION.

This was a petition under the *Settled Estates Act*, 1877, praying for the confirmation by the Court of an agreement for a lease of a distillery at *Bristol*, which formed part of certain estates settled by the will of *Thomas Harris*.

PEARSON, J. 1884. *In re* HARRIS' SETTLED ESTATES.

The testator, by his will dated the 8th of May, 1863, after directing his debts and funeral and testamentary expenses to be paid and bequeathing some legacies, devised and bequeathed all his real and personal estate unto and to the use of trustees upon trust for sale, conversion and collection, and to stand possessed of the residue of the net proceeds upon trust to invest the same as therein mentioned, and to assign and transfer the same, and the stocks and securities in or upon which the same might be invested, to and amongst all and every such child or children of his god-daughter, *Mary Ann Merry*, as should be living at his decease or born in due time after, to be equally divided between them, if more than one, when they should attain twenty-one.

The testator died on the 6th of March, 1866. *Mary Ann Merry* died on the 30th of October, 1874. She had six children living at the time of the testator's death, and she had no child born afterwards. The six children were *Robert C. T. Merry*, *Theodore A. Merry*, *Isabella Sarah Merry*, *Emily Flora Merry*, *John Merry*, and *Mary Elizabeth Merry*. *Mary Elizabeth Merry* died on the 9th of March, 1869, under twenty-one. The other five all attained twenty-one. *John Merry* died on the 1st of March, 1882, having by his will devised and bequeathed all his real and personal estate to his brother *Robert C. T. Merry* absolutely. In 1877 *Isabella Sarah Merry* married the Rev. *C. L. Coghlan*. By a settlement, dated the 17th of September, 1877, made in contemplation of the marriage, she assigned to trustees all her one-fifth share under the testator's will in all parts then remaining undistributed of his residuary estate, and in all moneys to arise from the sale and conversion thereof pursuant to the trusts of the will, to hold the same on trust for herself during her life, but during the then intended coverture for her separate use without power of anticipation, and after her death in trust for her then intended husband during his life, and, subject thereto, on certain trusts for the issue of the marriage, and failing such issue in trust for the wife, if she should survive the husband, but, if she should predecease him, on certain trusts for the testamentary appointees or next of kin of the wife. In 1880 *Emily Flora Merry* married *W. L. Wrenford*. By a settlement, dated the 30th of April, 1880, made in contemplation of the marriage, she assigned to trustees all her one-fifth

share under the testator's will in all parts then remaining undistributed of his residuary estate, and in all moneys to arise from the sale and conversion thereof pursuant to the trusts of the will, to hold the same upon trusts corresponding to those declared by Mrs. *Coghlan's* settlement of her one-fifth share under the will. In each of the marriage settlements there was a provision that, after the solemnization of the intended marriage, the trustees should either allow the one-fifth share thereby assigned, or any part thereof, to remain in its actual state of investment, or should at any time or times, with the consent of the husband and wife during their joint lives, or of the survivor during his or her life, or after the death of such survivor at the discretion of the trustees for the time being, call in and convert into money the one-fifth share, or any part thereof, and invest the proceeds as therein mentioned. At the time of the hearing of this petition there had been no issue of the marriage of Mr. and Mrs. *Coghlan*, but there were two infant children of Mr. and Mrs. *Wrenford; Robert C. T. Merry* and *Theodore A. Merry* were the trustees of the testator's will; *Robert C. T. Merry* and *Algernon Tatham* were the trustees of Mrs. *Coghlan's* settlement; and *Robert C. T. Merry* and *Theodore A. Merry* were the trustees of Mrs. *Wrenford's* settlement.

The distillery in question was part of the residuary estate of the testator which remained unconverted.

The Petitioners were *Robert C. T. Merry, Theodore A. Merry*, Mr. and Mrs. *Coghlan*, Mr. and Mrs. *Wrenford*, and the infant children of Mr. and Mrs. *Wrenford* by their father as their guardian.

The petition asked for the sanction by the Court of an agreement which had been entered into by the Petitioners (other than the infants) for a lease of the distillery for a term of twenty-one years, and that the trustees of the will might be at liberty to execute a lease, a draft of which had been prepared accordingly.

The petition was served on *Algernon Tatham*.

John Dixon, for the Petitioners:—

The only question is whether it is now necessary that the married ladies should be examined separately, as provided by

PEARSON, J. 1884 *In re* HARRIS' SETTLED ESTATES.

sect. 50 of the *Settled Estates Act*, 1877 (1). In *Riddell* v. *Errington* (2) it was held that, by virtue of sects. 1 and 2 of the *Married Women's Property Act*, 1882, such an examination is not now necessary in the case of a woman married since the commencement of that Act. The principle of that decision applies equally to the case of a woman married before the commencement of the Act, for sect. 1 speaks of "a married woman" in the most general terms. If a married woman can sue as if she were a *feme sole* she can petition in the same way.

PEARSON, J.:—

I think that sect. 1 of the *Married Women's Property Act* does not apply. In my opinion it applies, in the case of a woman married before the commencement of the Act, only to property which she may acquire after the commencement of the Act. The two ladies must be examined separately.

Solicitors: *Gregory, Rowcliffes, & Co.*

(1) Sect. 50 provides that "Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not."

Sect. 1 of the *Married Women's Property Act*, 1882, provides, by subsect. 2, that "a married woman shall be capable . . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her."

(2) 26 Ch. D. 220.

W. L. C.

PEARSON, J.
1884
Nov. 26;
Dec. 8.

In re KLŒBE. KANNREUTHER *v.* GEISELBRECHT.

[1882 K. 745.]

Administration—Domicil—Priorities.

In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors.

THIS was an action for the administration of the estate in *England* of *Charles Jules Alexander Klœbe*, a domiciled Greek, who died at *Syra* on the 15th of February, 1882, intestate and insolvent. The deceased carried on business in *England* in partnership under the style of *Charles Klœbe & Co.*, and was possessed of property in *England*. It did not appear whether there were any foreign assets. The Chief Clerk had certified that the assets consisted of a sum of £1710 19*s.* 2*d.*, the balance of the administrator's account in Court, and a sum of £1837 11*s.* 9*d.* Consols also in Court. That there was one separate debt of £50 7*s.* due to a foreign creditor, and that the partnership debts amounted to £3432 4*s.* 7*d.* due to English creditors, and £8456 18*s.* 3*d.* due to foreign creditors. The action now came on on further consideration.

Cozens-Hardy, Q.C., and *F. Thompson*, for the Plaintiffs, some of the English joint creditors :—

In administering the estate in this country of a domiciled foreigner, the duty of the representative acting under the subsidiary grant of administration obtained in this country is to get in the assets and pay the creditors in this country, and no other creditors; and then hand over the balance, if any, to the principal administrator in the country of the deceased's domicil: and foreign creditors have no right to prove or get payment in this country at all: *Cook* v. *Gregson* (1); *Eames* v. *Hacon* (2); *Blackwood* v. *The Queen* (3). The judgment of the Master of the Rolls in *Wilson* v. *Lady Dunsany* (4) cannot stand.

(1) 2 Drew. 286.
(2) 18 Ch. D. 347.
(3) 8 App. Cas. 82.
(4) 18 Beav. 293.

PEARSON, J. 1884 *In re* KLŒBE. KANNREUTHER *v.* GEISELBRECHT.

Cookson, Q.C., and *Emden*, for foreign creditors:—

The true rule is that in the administration of the personal estate of a domiciled foreigner, the law of the country where the assets are is to be applied in getting in the assets and getting rid of the liabilities, and according to English law creditors who happen to be foreigners are entitled to the same benefit as others. All the cases cited are consistent with that rule, except *Wilson* v. *Lady Dunsany* (1), which is consistent neither with the contention of the other side nor the true rule—a rule which is borne out by the text-books on private international law and the cases: *Story's* Conflict of Laws (2); *Westlake's* Private International Law (3); *Enohin* v. *Wylie* (4); *Simpson* v. *Fogo* (5); *De La Vega* v. *Vianna* (6).

MacSwinney, for the only separate creditor:—

If the contention of the foreign creditor is correct, the separate foreign creditor is admittedly entitled to priority. In addition to the argument already adduced, the analogy of the practice in bankruptcy is in favour of that contention: *Ex parte Melbourn* (7); *Thurburn* v. *Steward* (8).

Cozens-Hardy, in reply:—

The statement of the rule in *Williams* on Executors (9) favours our contention.

Dec. 8. PEARSON, J.:—

At the end of the argument I stated I had no doubt what my decision should be, but in consequence of my being told that there were decisions of learned Judges to whom I am bound to pay, and do pay, the greatest respect, who had supported a contrary contention, I thought it better to look at those judgments to see if they really supported that contention, and I am glad to find that they do not. It appeared to me, if that contention had anything in it, it must have been the practice of the Court to inquire in

(1) 18 Beav. 293.
(2) Sect. 525, 5th Ed. p. 871.
(3) Sect. 102, 2nd Ed. p. 112.
(4) 10 H. L. C. 1.
(5) 1 H. & M. 195.
(6) 1 B. & Ad. 284.
(7) Law Rep. 6 Ch. 64.
(8) Ibid. 3 P. C. 478.
(9) 8th Ed. p. 1670.

actions for the administration of deceased persons domiciled abroad as to the nationality of creditors, and I can find no case in which the Court in distributing assets has made an inquiry as to the nationality of different creditors, or ordered that English creditors should be paid in priority to others. There is not a fragment of authority for such a practice. I think Mr. *Westlake* in a passage cited lays down the law perfectly correctly. In sect. 102 of the last edition of his work on Private International Law, he says: "Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or of the assets is prescribed by the laws of the jurisdiction from which the grant issued." All that is there said, and no doubt correctly, is that although *mobilia sequuntur personam*, in the collection, the *lex fori* must be observed: so also is it to be observed in the administration of those assets when collected. Therefore, if a man dies domiciled in *England*, possessing assets in *France*, the French assets must be collected in *France*, and distributed according to the law of *France*. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori*, and for no other reason. But if it should happen that a man died domiciled in *France*, leaving assets in *England*, those assets can only be collected under an English grant of administration, and being so collected must be distributed according to the law of *England*. No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners. On the other hand the rule is they are all to be treated equally, subject to what priorities the law may give

PEARSON, J. 1884 *In re* KLŒBE. KANNREUTHER *v.* GEISELBRECHT.

them, from whatever part of the world they come, and in the case cited by Mr. *Cookson* of *De La Vega* v. *Vianna* (1), Lord *Tenterden* says (2): "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." And that has been the rule in this country, as far as I know, from the earliest time. Three cases have been cited by counsel for the Plaintiffs to establish a different rule, the first of these is *Cook* v. *Gregson* (3), before Vice-Chancellor *Kindersley*. The facts were these: A man died domiciled in *Ireland*, he had property both in *Ireland* and *England*. The same person proved in both countries. At that time the law in *Ireland* gave judgment creditors priority over simple contract creditors. Before the Irish creditors had been paid Irish assets were transmitted to this country, and it was said that inasmuch as the transmission had occurred, they had become English assets, and the Irish judgment creditors must remain in the same position as the other creditors. But the Vice-Chancellor said that was not so. The Irish judgment creditors had priority in *Ireland*, and were entitled to be paid according to the Irish rules of priority—a matter no one can dispute, nor could that case have been cited before me but for the words of a sentence in the Vice-Chancellor's judgment in which he says (4): "It so happens that in this case the same persons are executors in both countries, but the case must be decided on the same ground as if they were different. Now, if they were different persons, it is clear that the duty of each would be this: he must take care first to pay the debts owing in the country in which he is executor, and then, and not till then, if there is a surplus he may send it to the other country." That is to say, a man who takes out a grant as executor or administrator is bound to deal with the property under that grant, according to the law of the country which gives him the grant, and accordingly if you take out administration in

(1) 1 B. & Ad. 284.
(2) Ibid. 288.
(3) 2 Drew. 286.
(4) Ibid. 288.

Ireland you must administer all the assets in the Irish jurisdiction according to the law there, and you have no right to get rid of the assets there in order to give priorities to persons which they would not have in *Ireland*. But in this case the assets being in *England* the creditors coming in will claim simply according to the *lex fori* of the country where the assets are already, and by that they are all entitled to be paid equally. The next case is that of *Eames* v. *Hacon* (1). I have read that several times over and can find nothing in it affecting the question before me. The late Master of the Rolls said: "*Forbes & Co.* took out administration in *India* for the use and benefit of the plaintiff, and on what ground can they refuse to pay over the money to their principal? No doubt they, by taking out administration in *India*, made themselves liable to be sued by creditors there, and cannot be called on to pay over anything more than the surplus after satisfying the intestate's Indian liabilities." I think that is the only sentence which has anything to do with the question. No one doubts that. If there are Indian assets they must be distributed according to the law of *India:* if there are English assets they must be distributed according to the law of *England*. No one doubts that according to the jurisdiction of the country where the assets are the assets must be distributed. I am not speaking of the assets that remain after the payment of debts when the law of a man's domicil comes into play. The other case is that of *Blackwood* v. *The Queen* (2), in the Privy Council. The judgment was given by Sir *Arthur Hobhouse*, he says: "It does not appear to their Lordships that the doctrines relied on are by any means conclusive of the present question. In the first place, the statement that personal estate is governed by the law of its owner's domicil must be taken with material qualifications. To say nothing of other limitations, it is limited just at the point which is material for the present purpose. The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicil. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily

(1) 18 Ch. D. 351. (2) 8 App. Cas. 92.

PEARSON, J. 1884 ~~ *In re* KLŒBE. KANNREUTHER v. GEISELBRECHT.

extended to all legal personal representatives: as, for instance, when a creditor gets letters of administration in the Court of the domicil. And when the legal personal representative has been constituted in the foreign country, whether he be the executor of the domicil or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors priority as regards the foreign assets; as is shewn by the cases of *Preston* v. *Viscount Melville* (1); *Cook* v. *Gregson* (2)." I think you may take a slight exception to the language of that. I do not think Sir *Arthur* intended to say that in every country where a deceased man may have left assets they are to be distributed so as to give the creditors of that country priority, or that he meant to assert that in *Ireland*, for instance, an Englishman who had been trading with an Irish merchant would not have as great a right to be paid *pari passu* as any one else, but whatever the law in *France* or *India* may be, the law of *England* has always been that you must enforce claims in this country according to the practice and rules of our Courts, and according to them a creditor, whether from the furthest north or the furthest south, is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country, and which I must say, for the sake of honesty, I hope will always be the law of this country.

I may add that there seems to be some mistake in the case of *Wilson* v. *Lady Dunsany* (3); it is unfortunate that the case was ever reported.

Solicitors: *Field, Roscoe, & Co.; Goldberg & Langdon; Stibbard, Gibson, & Co.*

(1) 8 Cl. & F. 1. (2) 2 Drew. 286.
(3) 18 Beav. 293.

D. P.

HUNTER *v.* MYATT.

PEARSON, J.

1884

Dec. 6, 8.

[1884 H. 4068.]

Mortgage—Foreclosure—Personal Judgment against Mortgagor—Form of Judgment.

Form of judgment in a foreclosure action, when a personal judgment is taken against the mortgagor on his covenant for payment of principal and interest.

The form in *Grundy* v. *Grice* (1) modified.

THIS was a foreclosure action.

The Plaintiff was the first mortgagee of real estate belonging to the Defendant *G. Myatt* in fee. The mortgage deed was dated the 24th of August, 1880, and was made to secure a sum of £4400, with interest thereon at 5 per cent. per annum. The deed contained a covenant by *Myatt* to pay the £4400 to the Plaintiff on the 24th of February, 1881, with interest in the meantime at 5 per cent. per annum, and, if not then paid, to pay further interest thereon at the same rate until payment. Some second mortgagees were also made Defendants to the action. The statement of claim alleged that the £4400, and £353 13*s.* for interest thereon, were due to the Plaintiff on the mortgage. The Plaintiff claimed the payment of £4753 13*s.* from the Defendant *Myatt* personally, and foreclosure against all the Defendants in default of payment of what should be found due to the Plaintiff on the mortgage.

Myatt did not appear to the writ.

The second mortgagees did not deliver a statement of defence.

The action now came on for trial as a short cause.

Eastwick, for the Plaintiff:—

Under the common form of order given in *Seton* on Decrees, the Plaintiff cannot issue execution on the personal judgment against the mortgagor until the certificate is complete. If he issues execution he will either open the certificate, or he must amend

(1) *Seton* on Decrees, 4th Ed. vol. ii. p. 1036 (Form No. 2).

PEARSON, J. 1884 HUNTER v. MYATT.

it; otherwise he must waive his execution. In *Grundy* v. *Grice* (1) *Jessel*, M.R., made the order in such a form that the Plaintiff could issue immediate execution.

H. Child, for the second mortgagees.

PEARSON, J. (after consulting the Registrar):—

The order will be made in a form which has been adopted by the Registrars since *Grundy* v. *Grice* was decided, and which is an improvement on the form used in that case.

The order directed the mortgagor, within one month after the date of the judgment, to pay the £4753 13*s.* to the Plaintiff; then that an account should be taken of what was due to the Plaintiff under and by virtue of his mortgage, and for his taxed costs of the action, and in taking the account regard was to be had to the amount (if any) which the Plaintiff might have received under the previous direction for payment. Then followed the ordinary provisions for redemption and foreclosure, six months for redemption being allowed to the second mortgagees, and a further period of one month to the mortgagor.

Solicitors: *Hunters, Gwatkin, & Haynes.*

(1) *Seton* on Decrees, 4th Ed. vol. ii. p. 1036 (Form No. 2).

W. L. C.

In re UNITED STOCK EXCHANGE, LIMITED. *Ex parte* PHILP & KIDD.

PEARSON, J.

1884

Dec. 17.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 82 [*Revised Ed. Statutes, vol. xiv., p.* 221]—*Rules of November*, 1862, *r.* 2—*Winding-up Petition—Advertisements—Withdrawal—Contributories—Costs.*

A winding-up petition had appeared in the Court paper from time to time which had never been advertised:—

Held, that the petition could be withdrawn without payment of the costs of a shareholder appearing to oppose.

THIS was a petition for the winding-up of the *United Stock Exchange Limited* compulsorily by Messrs. *Philp & Kidd*, who claimed to be creditors. The petition was presented on the 10th of May, 1884. At that time a petition for the same object had been presented by one *R. S. Agnew*, who also claimed to be a creditor. The two petitions were in the Court paper frequently from time to time till, on the 15th of December, 1884, *Agnew's* petition was heard and dismissed with costs.

On Messrs. *Philp & Kidd's* petition being called, counsel asked on their behalf for leave to withdraw it. Their solicitor acting in the matter had made an affidavit that the petition had been presented in the belief that *Agnew's* debt had been settled; but when it was found that his petition was going to be prosecuted the petition of *Philp & Kidd* had not been verified by affidavit or advertised.

Oswald, for the petitioners:—

The company alone has been served, and does not oppose; no one else has any right to appear until advertisements have been issued, nor could any order for winding-up have been made without advertisements having been duly issued according to rule 2 of the order made to regulate procedure under the *Companies Act*, 1862, therefore, the petitioners may withdraw without paying the costs of any one appearing to oppose: *In re Marlborough Club Company* (1).

(1) Law Rep. 1 Eq. 216.

PEARSON, J.

1884

In re UNITED STOCK EXCHANGE, LIMITED. *Ex parte* PHILP & KIDD.

Everitt, Q.C., and *St. John Clerke*, for a shareholder:—

A shareholder has a *locus standi* to oppose, though he has not been cited by service: *In re Percy and Kelly Nickel Cobalt and Chrome Iron Mining Company* (1). When the petition has got into the Court paper he has a right to appear to protect himself against an order being made by collusion or otherwise, and is entitled to have his costs paid by the petitioner.

PEARSON, J. (after reading the 82nd section of the *Companies Act*, 1862, and the rule as to advertisements (Order of November, 1862, rule 2)):—

The form of advertisement provided is one which invites all creditors and contributories who wish, to appear and oppose. It is said the Court may dispense with following the rule as to advertisements. No doubt the Court has very wide dispensing power, but the Court always exercises such power in such manner as to meet the exigencies of the particular case, and not to frustrate the rules, and I am not aware of a single case in which the Court has dispensed with advertisements, and said that the contributories are not to have the benefit of the rule, and I should be very much surprised if I myself had an application made to me to dispense with the rule. The course of the proceedings is that the petition is first to be presented, and then the advertisements are to be issued. It is not the duty of the officers of the Court to know whether the advertisements have been issued or not, but in regular course the petition will come into the paper whether they have or not been issued, and if *per incuriam* the Court did make a winding-up order on a petition not duly advertised the Court is protected in this way—the Registrar would see that the advertisements had not been issued, and would at once stop the order. Now, under these circumstances, have creditors or contributories a right to appear? To my mind, until advertisements have appeared no person is a party to the proceedings except the petitioner and the company, and I am at a loss to see how contributories, who are represented by the company till they get a separate existence and *locus standi*, can have any right to come to the Court. To my mind it is an entire mistake to

(1) 2 Ch. D. 531.

suppose that a contributory has any right to appear until after advertisements. I am not referring to cases where there may have been some fraud. It may be that a person who has no *locus standi* otherwise is entitled to come to the Court and say that a fraud is being perpetrated. That is an exceptional case. This is not a case of that kind.

But it is said the company might have consented to a winding-up order being obtained; but that could not have been done, for the Court would not have listened to an application for a winding-up till the advertisements had been issued. And although I dismissed the petition of *Agnew*, and although it is quite possible that if prosecuted I should dismiss this petition with costs, I can see no reason why the petitioner should not be at liberty to withdraw it without costs, or why other persons should come here to make costs.

Solicitors: *A. M. Bradley; Lambert.*

D. P.

C. A.
1884
KAY, J.
Nov. 25.
C. A.
Dec. 1.

In re CALLAGHAN.
ELLIOTT *v.* LAMBERT.

[1879 C. 264.]

Infant—Ward of Court—Leave to take Ward of Court out of the Jurisdiction.

A resident in *Jamaica* died leaving two children, who were born there, and resided there with their mother till 1875, when the elder, a daughter, was sent to *England* to be educated. The mother came to *England* in 1876 to place her son at school, and returned to *Jamaica* in 1878. In 1880 she came to *England* to see her children and had remained there, the daughter, upon leaving school, living with her. With the above exceptions the mother had always lived in *Jamaica*, and regarded it as her home. She now wished to return thither permanently, and to take with her the daughter aged twenty years and three months, the son, who was apprenticed to an engineer, remaining in *England*. The children were wards of Court, and the mother had been appointed by the Court sole guardian:—

Held, by *Kay*, J., that the Court would not allow a ward of Court to be taken out of the jurisdiction except under very special circumstances, and that there were not in the present case any such special circumstances as would justify giving the permission:

Held, on appeal, that leave may be given to take a ward out of the jurisdiction without a case of necessity being shewn, the Court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed. Leave was accordingly given upon a relative resident in *England* being appointed guardian along with the mother.

REGINALD HENRY ELLIOTT died at his residence in *Jamaica* in 1865, leaving a widow and two infant children, *Florence Mary Elliott*, born in July, 1864, and *James Callaghan Elliott*, born in 1865. The children lived with their mother in *Jamaica* till 1875, in which year the daughter was sent to *England* to be educated. Mrs. *Elliott* in 1876 brought her son to *England* to place him at school, and returned to *Jamaica* in 1878. In 1880 she came to *England* to see her children, and had since remained there.

Mrs. *Elliott's* father, *Daniel Callaghan*, died in 1876, leaving a will by which he bequeathed to each of the above children a legacy of £3000, and one-fourth of his residuary estate. In 1879 judgment was given in this action for carrying into execution the

trusts of the will, the children, by their next friend, being Plaintiffs. By an order of the 9th of July, 1883, made in the action, Mrs. *Elliott* was appointed guardian of her children, and an allowance was made to her for their past maintenance and education up to the end of 1882, and it was ordered that £50 a year should be allowed from that time for the maintenance of the daughter, and £150 a year for the maintenance and education of the son.

In November, 1884, Mrs. *Elliott* arranged to return to *Jamaica*, and took a passage for herself and daughter in a vessel starting on the 2nd of December, not being aware that the leave of the Court was necessary to taking the daughter out of the jurisdiction. On being informed that such leave was necessary, she applied for it. By her affidavit in support of the application, after stating the ages of the children and their residence in *Jamaica* till they came to *England*, as mentioned above, she went on to say that she herself was born in *Jamaica* and had lived there till 1876, when she came to *England*, as mentioned above, and, with the exception of some relatives of her husband and friends with whom she had become acquainted in *England*, nearly all her relatives and friends were in *Jamaica*. That the testator had by his will devised a property there upon trust to pay the rents to her for life, and that she was interested in other property in *Jamaica*, and had a large quantity of furniture there—that she had always regarded *Jamaica* as her home, and had never intended permanently to reside in *England*. That she was now desirous of returning to *Jamaica* and residing there permanently—that her daughter had resided with her since she finished her education, and it was desirable that she should continue to do so. That she (Mrs. *Elliott*) was anxious that the daughter should return to her home in *Jamaica* with her and reside with her there, and that the daughter was very desirous of doing so. That there was no other reason than the above for the daughter going out of the jurisdiction. That the daughter would be maintained by her out of the £50 allowance, and out of the mother's own income so far as the allowance was insufficient. That the only relatives of the daughter now living, beside the mother, were a paternal uncle resident in *Jamaica*, and two paternal uncles and a paternal aunt resident in *England*, and certain cousins, and that the uncles and aunt in

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England approved of the daughter going to *Jamaica*. That she (Mrs. *Elliott*) proposed to return with her daughter to *England* for a visit in a year or two to see her son, who had been apprenticed to an engineer at *Northampton*, and was residing at the *School House, Northampton*. That she proposed that the daughter should reside with her in *Jamaica* until the visit to *England*.

The application was made by *ex parte* motion before Mr. Justice *Kay* on the 25th of November, 1884.

Kekewich, Q.C., for the application.

KAY, J. :—

It is not the practice of the Court to allow its infant wards to be taken out of the jurisdiction and so removed from its control except under very special circumstances, and there do not appear to me to be in this case any special circumstances such as would justify my giving the permission asked for. The young lady will attain twenty-one in about nine months and she will then be able to do as she pleases. The application must be refused.

C. A.

On the 28th of November *Kekewich*, Q.C., renewed the application before the Court of Appeal. The Court suggested that if the daughter was to be taken abroad an undertaking should be given by the mother and by some relation resident in *England* that the ward should be brought within the jurisdiction at any time during her minority if the Court should require it, and that no contract of marriage should be entered into during her minority without the leave of the Court. It was arranged that the mother and daughter should have an interview with the Judges, and that the case should be mentioned again. The ladies accordingly attended the Judges on the 1st of December in their private room. On returning into Court their Lordships stated their conclusions as follows :—

BAGGALLAY, L.J. :—

When this case was first mentioned by Mr. *Kekewich*, the Court inquired whether any relative of the ward would join with her mother in an undertaking to bring the young lady within the jurisdiction at any time during her minority, if required by the

Court to do so. We have to-day seen the mother and the ward, and also an uncle of the latter, who is resident in *England*, and has consented to be appointed joint guardian. An undertaking, therefore, will not be necessary. Mr. Justice *Kay* seems to have thought that in no case will the Court allow its ward, especially a female ward, to be taken out of the jurisdiction unless it is shewn to be necessary. We think that there is not any absolute rule of that kind, and that all we have to consider is whether it is established to our satisfaction to be for the benefit of the ward that the application should be granted. The young lady attained the age of twenty in last July. She was born in *Jamaica*, which her mother looks upon as her home. The mother is returning to *Jamaica*, the brother of the ward is in *England*, but is younger than herself, and her other relations who reside in *England* approve of her accompanying her mother. We think that under the circumstances it is more for the benefit of the young lady that she should accompany her mother than that she should be left here. We therefore are of opinion that, on the appointment of the uncle as joint guardian, permission for her to go with her mother to *Jamaica* should be granted. An undertaking as to her not contracting a marriage without the leave of the Court will not be required. We have explained to the guardians their duties in that respect, and we have no doubt that they will duly discharge them.

BOWEN, L.J.:—

I am of the same opinion.

FRY, L.J.:—

I am of the same opinion. We have only to consider two points: first, what is for the interest of the young lady; secondly, what is the security which the Court has that any future order will be obeyed. I think that under the circumstances it is most for the welfare of the ward that she should be allowed to accompany her mother, and that in the appointment of the guardian resident in this country the Court has the requisite security.

Solicitors: *Cookson, Wainewright & Pennington.*

H. C. J.

C. A.
1884
V.-C. B.
Oct. 31;
Nov. 1.
C. A.
Dec. 5.

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[1884 W. 2590.]

Railway Company—Landowner—Branch Railway—Siding—Right of User—Renewing Junction—Board of Trade Order—Interlocking and Signalling Apparatus—Liability of Landowner—Removing Junction—Injunction—Regulation of Railways—3 & 4 *Vict. c.* 97, *s.* 5—5 & 6 *Vict. c.* 55, *ss.* 4, 6, 12 [*Revised Ed. Statutes, vol. viii., pp.* 1174, 1176]—*Railways Clauses Consolidation Act*, 1845, *s.* 76 [*Revised Ed. Statutes, vol. ix., p.* 726].

The Plaintiff, and his predecessors in title, as owners of land adjoining a single line of railway, had ever since the year 1861 used a junction siding connecting the railway with a foundry on their land, the siding being the only access to the foundry. The Defendants, the railway company, having doubled their line, the Board of Trade, acting on the report of their inspector and as a condition for certifying the line to be fit for traffic, required the company either to provide the junction of the siding with the modern and improved system of interlocking and signalling apparatus, or to remove the junction, which was of an old-fashioned description. The company then called upon the Plaintiff to execute the work or pay the costs of it, but this the Plaintiff declined to do, whereupon the company took up the junction points:—

Held, by *Bacon*, V.-C., that the Plaintiff had, under sect. 76 of the *Railways Clauses Consolidation Act*, 1845, a statutory right to the use of his siding in connection with the company's railway, the company's Parliamentary powers being subject to that right; and an injunction was therefore granted restraining the company from continuing to prevent communication between his siding and the railway, and compelling the company to restore the junction.

Powell Duffryn Steam Coal Company v. *Taff Vale Railway Company* (1) distinguished.

Held, on appeal, that as the Plaintiff's predecessors in title had acquired a perpetual right to use the siding under a clause as to sidings in an old local Act for making a tramway, which had since been converted into the railway of the Defendants, and the subsequent Acts contained saving clauses sufficient to protect all rights acquired by the Plaintiff under the old Act, the case did not depend on the *Railways Clauses Act*, and that the Plaintiff retained the right acquired under the old Act to use the siding without contributing to the expense of the new apparatus, such Act containing nothing to oblige the Plaintiff to make or pay for the interlocking apparatus.

Held, also, that if the case had turned on the 76th section of the *Railways*

(1) Law Rep. 9 Ch. 331.

Clauses Act, the Court would not have decided the question whether the Plaintiff was bound to pay for the interlocking apparatus, without first ascertaining what, in the year 1845, was included in the terms "offset plates" and "switches" used in that section.

MOTION.

The Plaintiff was the lessee and occupier of the *Machen Foundry*, in the county of *Monmouth*. The foundry stood on land adjoining the old *Rumney Railway*, which was constructed soon after 1861 as a conversion of a tramway which had existed since about 1831. The railway now belonged to the Defendant company. Before the conversion of the tramway into a railway the Plaintiff's foundry had been connected with it by a junction and siding, which were renewed when the conversion took place. The junction consisted of moveable points or switches worked by an adjacent hand-lever according to the method in general use at the time the siding was constructed and renewed.

The Plaintiff had continuously used this siding and junction in connection with the foundry until 1882, when operations at the foundry became suspended.

The Defendants' railway having been originally a single line, they proceeded to double it to meet the increased traffic. This work was completed in the early part of the year 1884, and Colonel *Rich*, one of the railway inspectors to the Board of Trade, then went over and examined the line prior to certifying it to be fit for public traffic. On visiting the *Machen Station* he noticed the junction of the Plaintiff's siding, and, acting upon his report, the Board of Trade required the Defendant company either to provide the siding with the modern improved system of interlocking apparatus and junction signals worked by a lever in a signal-box, or to remove the existing junction.

Upon receiving this request from the Board of Trade, the company's secretary wrote to the Plaintiff on the 30th of April last, calling upon him to execute the work or pay the cost of it, and stating that unless he executed the work or entered into an agreement within fourteen days, the points would be taken up.

The Plaintiff not complying with this request, on the 12th of October the company again gave him notice requiring the siding junction to be interlocked with and protected by signals at his

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expense. Some correspondence then passed between the Plaintiff and the company's manager, the result of which was that he declined to pay the cost of interlocking, whereupon the company took up and removed the points. The Plaintiff then brought this action against the company, and moved for an injunction to restrain them from continuing to prevent communication between his siding and the railway, and to compel the company to restore the junction in such a manner as to permit carriages to be brought to and from the siding and the railway.

The Plaintiff stated in evidence that his siding was his only means of communication with the foundry, but on the part of the company it was stated that some other mode of access could be easily provided.

It was said this was a test case, other owners of sidings along the Defendants' railway being in the same position as the Plaintiff.

The motion came on to be heard before Vice-Chancellor *Bacon* on the 31st of October, 1884.

Marten, Q.C., and *Hunter*, for the Plaintiff:—

This is a mere attempt on the part of the company to throw upon the Plaintiff the expense of works which they have been ordered to execute by the Board of Trade. The requisition of the Board of Trade is made upon the company alone, and it is therefore the company's duty to carry out the directions of the Board: the Plaintiff is in no way bound by agreement or otherwise to see that the work is done. Moreover, by sect. 76 of the *Railways Clauses Consolidation Act*, 1845, the owner of land adjoining a railway has a statutory right to make and use sidings subject to the conditions referred to in the section, and the company are bound to afford him facilities for that purpose. Accordingly, the Court will interfere to prevent the company obstructing his enjoyment of this statutory right, and will, if necessary, order the company to restore siding-junctions which they have removed: *Todd & Co.* v. *Midland Great Western Railway of Ireland Company* (1); *Bell* v. *Midland Railway Company* (2). We submit, therefore, that in this case the company are bound to replace the points they have taken up.

(1) 9 L. R. Ir. 85. (2) 3 De G. & J. 673.

Horton Smith, Q.C., and *Dryden*, for the Defendant Company :—

The question really turns upon the meaning of sect. 76 of the *Railways Clauses Consolidation Act*, 1845. Under sect. 5 of 3 & 4 Vict. c. 97, the Board of Trade has power to appoint inspectors of railways. Then 5 & 6 Vict. c. 55, provides (sect. 4), for notice being given to the Board of Trade of the intended opening of a railway and of its being ready for inspection: empowers (sect. 6), the Board of Trade to postpone the opening on the report of the inspector that it would be attended with danger to the public "by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railway"; and (sect. 12), empowers the Board of Trade to make regulations for the user of branch lines belonging to landowners so as not to endanger the safety of the public. Then the *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20), empowers (sect. 76), adjoining landowners to make and use private branch railways subject to the restrictions of 5 & 6 Vict. c. 55, and the company are, at the request and at the expense of such landowners, to make openings in the rails for effecting the necessary communications. But that enactment is made subject to certain conditions, including the following: "The persons making or using such branch railways shall be subject to all bye-laws and regulations of the company from time to time made with respect to passing upon or crossing the railway, and otherwise; and the persons making or using such branch railways shall be bound to construct, and from time to time, as need may require, to renew, the offset plates and switches according to the most approved plan adopted by the company, and under the direction of their engineer." There is thus a statutory obligation, not upon the company but upon the owner of the branch railway or siding, to construct and, "as need may require, to renew," the junction. The work must, moreover be done "according to the most approved plan adopted by the company," that is to say, with all the improvements the company consider necessary as the result of experience, and the work is to be done at the expense of the owner of the siding. At the present day, "the most approved plan" of constructing a junction is by fitting it with the signalling and interlocking apparatus, that being the system found by

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experience to be the one most conducive to the safety of the public. In order to insure the work being carried out efficiently the company here offer to do it themselves, though this does not dispense with the statutory obligation on the Plaintiff to pay the cost of it.

With regard to the authorities that have been cited, the foundation of the decision in *Bell* v. *Midland Railway Company* (1), was that the assent of the company having been given to the opening of the railway for a siding at a particular place, it could not afterwards be revoked; but here there is no question about the point of junction. Again, *Todd & Co.* v. *Midland Great Western Railway of Ireland Company* (2), was a different case from the present; it was not an action for an injunction, but for the specific performance of an agreement by the company to lay down a siding. But we further submit, that this is not a case for an injunction at all, inasmuch as restoring the points would involve the continuous employment by the company of signalmen and others; and it has been decided that the Court will not grant an injunction involving the performance of a continuous act like working signals, the doing of which requires continuous attention and cannot be seen to by the Court: *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (3), a case which is very similar to the present, and was approved of and distinguished in *Todd & Co.* v. *Midland Great Western Railway of Ireland Company*. We therefore submit that, the Plaintiff not having complied with the conditions of sect. 76 of the *Railways Clauses Consolidation Act*, 1845, which alone gives him any right to use his siding at all, the company were justified in taking up the points.

Marten, in reply:—

In the *Powell Duffryn Case* the action was to compel the railway company to grant running powers over their line, which would necessitate the continuous working of signals, and the Court refused to grant any relief involving the performance of a continuous act of that kind. But in the present case we do not

(1) 3 De G. & J. 673. (2) 9 L. R. Ir. 85.
(3) Law Rep. 9 Ch. 331.

ask the company to do anything: we only ask them not to interfere with our statutory right by removing our points. It is, however, a fallacy to say that in no case can a company be compelled to do certain acts or to execute specified works. In *Todd & Company's Case* (1) the Irish Master of the Rolls distinguishes the *Powell Duffryn Case* (2) by pointing out (3) that it did not lay down, and was not intended to lay down, any such principle as that a company could not be compelled to execute works. Then, as instances of such relief having been given, he refers to *Lytton* v. *Great Northern Railway Company* (4) and *Greene* v. *West Cheshire Railway Company* (5) before your Lordship.

Now this work of restoring the junction involves a single act which can be done without the least difficulty.

[BACON, V.C.:—It is a mere question of so many shillings.]

This is an attempt to throw upon us, and the other owners of sidings along the line, a large portion of the expense of making what is virtually a new railway. Such is not the intention of sect. 76 of the *Railways Clauses Act*. That section does not require more than the renewal of the sidings and junctions when out of repair: it does not mean that the owner of a siding is to construct new works whenever the company choose to alter their line. Nor do the words "offset plates and switches" include interlocking apparatus.

But apart from the expense—whether we should bear it or not is not the question now—the company are not entitled to destroy our statutory right of access to their line by means of their siding and junction.

BACON, V.-C.:—

In this case the Defendants have been empowered by Act of Parliament to make a railway. A company making a railway under the authority of Parliament is under the control of the Board of Trade: accordingly, the board send down their inspector to look at this railway and see if it is all right. There appear to be several branches going out from this railway, the particular

(1) 9 L. R. Ir. 85.
(2) Law Rep. 9 Ch. 331.
(3) 9 L. R. Ir. 100.
(4) 2 K. & J. 394.
(5) Law Rep. 13 Eq. 44.

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portion of railway now before the Court being one of those branches. Colonel *Rich* then comes and looks at the railway and says: "This junction with a disused foundry should be taken out, or the points should be interlocked with the signals." That is to say, the inspector having control over the Defendants' railway points out to them that for the safety of the public, and in compliance with the law, they must do one of two things—either abolish the siding or interlock it with the signals. That is a direction by the Board of Trade to the railway company with which the Plaintiff has nothing to do. That, then, is the position of the railway company as regards the Board of Trade.

Now what is the position of the Plaintiff? The Plaintiff is entitled, under the 76th section of the *Railways Clauses Act*, to connect his railway with the Defendants' and to use it. He accordingly has exercised that right, and has exercised it without interruption for some considerable time in connection with the Defendants' original single line of railway.

Ultimately it becomes necessary for the purposes of the traffic that the company should double their railway, and they proceed to do so. They must get the sanction of Colonel *Rich* to what they are doing. Colonel *Rich* thereupon comes down to inspect the railway and makes a report to the effect I have already stated, which is followed by an order of the Board of Trade based upon that report. Then the company say to the Plaintiff, "You must pay us a tax; we are bound to incur the expense caused by Colonel *Rich's* report, and now you must indemnify us against that expense"; but such a liability can only arise out of some contract or enactment in a statute. In this case there is no such contract between the parties, and there is no statutory enactment which authorizes such a demand. The right of the Plaintiff under the 76th section is a statutory right subject to which the Defendants can make their railway, and which right they cannot in the slightest degree impeach nor refuse the specific performance of; but having already submitted to this right, as I have said, for some time, because he will not consent to do as they wish him they take up the points of his railway. On the 12th of October it appears that the company gave notice that they required the junction to be interlocked and protected by signals at

the Plaintiff's cost. The Plaintiff declined to pay the costs of interlocking, and the company thereupon took up and removed the junction between his railway and theirs; that is to say, they repealed the 76th section of the *Railways Clauses Act* so far as concerned the Plaintiff. In my opinion, they had no right whatever to do that.

The case of *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (1), which has been referred to, was decided upon a different principle altogether. In that case, if the application of the Plaintiff had been acceded to, there would have been an order that the railway company should do something. The Plaintiff in this case does not ask the railway company to do anything except to desist from injuring him and interfering with his statutory right under the 76th section. If they do not comply with Colonel *Rich's* order they will have to settle that with Colonel *Rich* or the Board of Trade.

The question before me is a very simple one. The company say to the Plaintiff, "In order to make our railway we must interlock, and we are ordered to interlock, but we want you to pay the expense; and if you do not undertake to pay this tax we levy upon you we will take up your railway"; and, he not paying the tax, they take up his railway. The Plaintiff asks that his rights under the 76th section may be preserved to him, and that that right which the section gives him as against the railway company shall be enjoyed by him without any interference by the company. There is no suggestion that "the offset plates and switches" are in bad repair, or that anything else the statute requires from the owner of a branch railway is in an improper condition. No such suggestion has been made; and if there had been I daresay it would have been remedied.

It appears to me that the Plaintiff is entitled under the statute to the relief he asks. There will, therefore, be an injunction until the trial in the terms of the notice of motion, but the Plaintiff must give the usual undertaking in damages. I should add that, as regards the Defendants' allegation that the Plaintiff can find a way to his foundry by some other road, I think that is also answered by the statute.

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The Defendants appealed, and the course which the case took on appeal makes it necessary to state the earlier history of the siding.

By 6 Geo. 4, c. lxii., a company was incorporated, under the name of the *Rumney Railway Company*, for the purpose of making a railway or tramroad between the points therein mentioned. By sect. 79 of that Act it was provided "That it shall and may be lawful for the owners and occupiers of the respective lands or grounds lying adjoining or near to the said railway or tramroad, or any other person or persons whomsoever, to lay down either upon their own lands, or upon the lands of other persons with the consent of such other persons, any collateral branch or branches from their respective lands or grounds to communicate with the said railway or tramroad, or for making at their own expense such openings in the ledges or flanches of the said railway or tramroad as may be necessary or convenient for effecting such communication: provided such collateral branch or branches, if made from a point at a lower level than the said railway or tramroad, shall be made on a level line without any fall, and if made from a point at a higher level than the said railway or tramroad, then that the said branch or branches shall join the said railway or tramroad in a direct line, if that can be done without a fall exceeding eight inches in a chain, or if not, then at the nearest point to the said railway or tramroad, taking a fall not exceeding eight inches in a chain. And the said company shall not receive any tonnage for the passing of any goods or other things along such branch or branches, so to be made by any owner or occupier, or person or persons as aforesaid."

A single line of tramroad was constructed under the powers of the above Act, and the predecessors in title of the Plaintiff, in or before 1831, made from their property a branch communicating with this tramroad. There was no evidence as to any special agreement on the making of this branch, nothing being known beyond the bare facts, that it had been made and had subsisted from that time. The tramway appeared to have been turned into a railway with a single line shortly before 1861.

By the *Rumney Railway Act*, 1861 (24 & 25 Vict. c. ccxxvii), which was passed for the purpose, *inter alia*, of enabling the

Rumney Railway Company to turn this line into a railway for passenger traffic, the *Companies Clauses Act*, the *Lands Clauses Act*, and the *Railways Clauses Act* were incorporated, save so far as the provisions of any of those Acts were varied by the Act. The old Act was repealed, but the company was continued with additional powers, and by sect. 8 it was enacted that "notwithstanding the repeal of the recited Act, and except only as is by this Act otherwise expressly provided, everything before the commencement of this Act done, suffered and confirmed respectively under or by the repealed Act, shall be as valid and effectual, both for and against and with respect to the company, as if the repeal had not happened; and the repeal and this Act respectively shall accordingly be subject and without prejudice to everything so done, suffered and confirmed respectively, and to all rights, liabilities, claims and demands both present and future, which if the repeal had not happened would be incident to and consequent on any and every thing so done, suffered, and confirmed respectively: Provided that the generality of this provision shall not be restricted by any other of the sections and provisions of this Act."

In 1862, the tramway having been converted into a railway the siding to the Plaintiff's property was renewed, but under what circumstances did not appear.

The Defendants acquired the *Rumney Railway* under the powers of the *Rumney and Brecon and Merthyr Railways Act*, 1863 (26 & 27 Vict. c. ccii.), under which, on acquiring the railway, they succeeded to all the rights and liabilities of the *Rumney Railway Company* in respect of it.

The appeal was heard on the 5th of December, 1884.

Horton Smith, Q.C., and *Dryden*, for the Appellants:—

[THE COURT intimated that the only point now properly before them was what ought to be done till the trial; but at the request of both parties proceeded to hear the case as if it had been at the trial.]

The requirements of the Board of Trade must be complied with, and the only question really is whether the Plaintiff must bear the expense of complying with them. The case was treated

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below as turning entirely on sect. 76 of the *Railways Clauses Act*, 1845, and that we contend is the true view; but the Plaintiff's advisers have informed us that they shall rely on an earlier Act. Supposing the case to turn on sect. 76, that section binds the persons owning the siding to construct, and from time to time, as need may require, to renew, the offset plates and switches, according to the most approved plan adopted by the company. The evidence shews that the works which the Board of Trade requires us to do are inseparably connected with the switches, and they therefore come within the scope of the section.

[FRY, L.J.:—The owner of the siding is to "construct" according to the most approved plan—that must mean according to the plan approved at the time of the construction. Does not that shew that the approved plan, according to which that renewal is to be made, is the plan approved at the time of construction?]

We submit that the reasonable construction of the clause is that whatever is to be done under it, whether construction or renewal, is to be according to what is the approved plan at the time when the work is done.

[THE COURT here said that if the question had to be decided on the *Railways Clauses Act*, they should not decide it without obtaining the opinion of an expert on the questions—what in 1845 was the meaning of the words "offset plates," and what in 1845 was the meaning of the word "switches," and what in each case was the nature of the apparatus included in the expressions, and in particular whether the term "switch" included any rods or levers, and if so what?]

The Respondent further contends that this is a siding which does not come at all within the *Railways Clauses Act*. The siding was made under the Act of 1825, but that Act was repealed in 1861 by an Act which incorporated the *Railways Clauses Act*. After the passing of the Act of 1861 the siding was renewed, and it must be inferred that it was renewed on the footing that it should be subject to the *Railways Clauses Act*, which was incorporated.

[FRY, L.J.:—If the siding was not used under a revocable

license, the Plaintiff, under the saving clause in the Act of 1861, retains his old right of perpetual communication.]

If he has a statutory right of communication, still all things which are necessary to make that communication effective must be done at his expense. If the Court should hold otherwise, then the question is which party is under the greater pressure. We are under no obligation to give the Plaintiff anything more than the old switch and hand lever.

[FRY, L.J.:—I am not clear as to that. The Plaintiff has a right to use the communication, and you for your own purposes make alterations which necessitate a further apparatus. Must not you make that apparatus?

BOWEN, L.J.:—You are bound not to make alterations which will prevent the Plaintiff from enjoying his communication.]

If neither party is bound to do anything, then if both are obstinate, the railway may be closed to the public.

Suppose the Plaintiff has the right he claims it cannot be enforced by injunction: *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (1).

[This point was abandoned, the Court observing that the case had been allowed to be argued out on the ground that the parties desired to have a decision as to the liability of the Plaintiff to pay for the new apparatus.]

Marten, Q.C., and *Hunter*, for the Plaintiff, were not called upon.

BOWEN, L.J.:—

Mr. *Woodruff*, the Plaintiff in this case, is the occupier of a foundry which has for many years had communication by means of a siding with the railway of the Defendant company. The company have made alterations in their line, in consequence of which they have been obliged to obtain the sanction of the Board of Trade to the opening of their altered line, and the board has required them to set up an interlocking apparatus at the junction with the siding. The company required Mr. *Woodruff* to bear

(1) Law Rep. 9 Ch. 331.

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the expense of this alteration, and as he did not acquiesce in this, the company proceeded to cut off his communication with their railway. He thereupon appeals to the Court asking for a decision that he is entitled to use the siding without contributing to the expense of the new apparatus. If the question had to be decided on the construction of the *Railways Clauses Act*, 1845, sect. 76, and we had to make up our minds as to the meaning of the words "offset plates and switches" there used, we should not have decided the case without inquiry from an expert what was the meaning of those words in the year 1845. But in our opinion it is not necessary to consider whether or no the Plaintiff would be right if the case turned on the Act of 1845, for we consider that it must be decided in his favour under the earlier Acts relating to this railway. The company assents to our deciding the case according to our view of what the rights of the Plaintiff are, without reference to the question whether those rights can be enforced by injunction.

The Defendants' railway, with which the Plaintiff's siding communicates, was formed as a tramway for mineral traffic under a local Act passed in 1825. The 79th section of that Act authorizes the owners of adjoining property to make sidings. [His Lordship read the section.] Under that statutory power the Plaintiff's predecessors in title made the siding in question. The counsel for the company admitted, as they must needs admit, that the effect of that section was, to give to owners of adjoining property who availed themselves of it, a perpetual right of enjoyment the sidings which they constructed. The landowner goes to the expense of making a siding on the ground of the statutory right, and when he has made it the statute gives him a perpetual right of using it. What the character of the junction was we need not inquire, it was a junction with the railway in its then shape, a junction which the then landowner and his successors in title were entitled for ever thereafter to use. A subsequent Act of 1861 empowered the company to convert the tramway into a passenger line, and to make it into a railroad for that purpose. This Act was not intended to interfere with any rights then vested in third parties. The 8th section saves all existing rights, and its effect as regards rights of this nature cannot be limited

by the exception "except only as by this Act otherwise expressly provided," there being no express provision applicable to such rights. In the year after the passing of that Act the junction was renewed, and took the shape which it retained till the commencement of the present dispute. The Defendants ask us to draw an inference as to the nature of the new junction. We have no materials for coming to a conclusion on that subject, but, if the renewal was a renewal of the old work, the rights of the parties must remain the same—if it was a new work, we cannot draw the conclusion that it was done on the condition that the *Railways Clauses Act* should apply to it. The siding was an existing siding when that Act passed, and the Act did not apply to it. The siding having been made under the old Act, the company had no right to prevent the Plaintiff from using it until he had done some additional works.

Then it is urged that the company is under no obligation to give the Plaintiff the use of any new apparatus which the company puts up. The company has by alterations in its line brought down upon it the Board of Trade, which requires an interlocking apparatus to be erected at this junction. It is therefore the act of the company which has caused the necessity for the alterations, and it does not lie in the mouth of the company to say that the Plaintiff shall pay for them. I do not say that the company are bound to provide an interlocking apparatus for the Plaintiff's use, but if they set up such an apparatus upon the junction, which is the Plaintiff's only way of communication with their line, they must allow him to use that apparatus.

FRY, L.J.:—

I am of the same opinion. The 79th section of the Act of 1825 gave the Plaintiff's predecessors in title a right to construct this branch, and it appears to me that the effect of the enactment was to give the persons constructing the branch a perpetual right of using it, and to impose on the company an obligation to do nothing which would interfere with that user. The Act 5 & 6 Vict. c. 55, s. 12, enables the Board of Trade to put restrictions on the user of such rights, which answers the argument that to hold the Plaintiff to have this right of user would enable him in

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effect to stop the railway. The siding was made about the year 1831, and appears to have been used nearly up to the present time. I gather from the Act of 1861 that prior to that year the tramroad had been converted into a railroad. In 1861 an Act was passed, one object of which was to enable the railway to be converted from a mineral railway into a passenger railway. This Act repealed the Act of 1825, but without prejudice to anything previously done under it, and to all rights, liabilities, claims, and demands, which, if the repeal had not happened, would have been incident to and consequent on anything so done. That saves the right which accrued to the Plaintiff's predecessors in title upon their making the siding. I infer that when the conversion from a tramway into a railway took place a corresponding change was made in the communication from the Plaintiff's property. At all events the communication was kept up. I think, therefore, that the *Railways Clauses Act* has nothing to do with the case, and that the title of the Plaintiff to the siding depends on the Act of 1825.

Now when a person has got a perpetual right of using a communication with the line of a company, if the company wish to make alterations in their line, they must do so in such a way as to save his right of user, and must not do anything to interfere with that right. The company here have altered their line in such a way, that, if the Plaintiff's user of his communication is kept up, the company cannot use their line unless they construct a new apparatus. If then they wish to use their line they must provide that apparatus at their own expense. The appeal is dismissed with costs, and by consent we dismiss the action with costs.

Solicitors: *Robinson, Preston, & Slow*, agents for *Colborne, Ward, & Colborne, Newport, Monmouthshire; S. F. & H. Noyes*, agents for *Cobb & Tudor, Brecon.*

H. C. J.

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C. A.
1883
NORTH, J.
Aug. 4, 6.
C. A.
1884
Dec. 4, 15.

Appointment—Fraud on Power—Appointment upon a Bargain to settle the appointed Property.

Real estate was vested in trustees under a will, upon trust as to one moiety to pay the rents to *A.* for life, and after his death to convey it to and among his children who should attain twenty-one, and if he had no such child then on the trusts of the other moiety, and as to the other moiety on similar trusts for *B.* and his children. The will empowered the trustees if they should think fit to convey the shares of *A.* and *B.*, or either of them, to them in fee. In 1882 *A.* and *B.*, the younger of whom was of the age of sixty-two, and neither of whom had any child, having incumbered their interests, and being pressed by their mortgagees, applied to the trustees to exercise the power of giving them their shares of the estate in fee. An arrangement was made between *A.* and *B.* and the trustees that the trustees should, in exercise of their power, convey the estate to *A.* and *B.*, as tenants in common in fee, and that, subject to such mortgages as should be approved by the trustees for raising money to pay off the existing mortgages, a part of the property should be settled upon trusts which gave *A.* and *B.* respectively powers of appointment in favour of their respective children and remoter issue, and powers of jointuring their wives. The trustees accordingly conveyed to *A.* and *B.*, as tenants in common in fee, and the re-settlement, which vested the equity of redemption in new trustees, with a power of sale, upon the trusts which had been arranged, was made by a deed which recited that the trustees had exercised the power on condition that the settlement should be made:—

Held, on appeal, that looking at all the circumstances of the case, it was not shewn that the bargain for the re-settlement induced the appointment, or that if the bargain had not been entered into the appointment would not have been made, and that the appointment and settlement were therefore valid, and that the trustees of the settlement could make a good title.

WILLIAM TURNER, by his will, dated the 16th of May, 1829, devised and bequeathed his real and personal estates unto and to the use of trustees, their heirs, executors, administrators, and assigns, upon trust to pay certain life annuities to his daughter, Mrs. *Merryweather*, and upon further trust to apply for the benefit of his six grandchildren therein named, the children of Mrs. *Merryweather*, the yearly sums therein mentioned, such yearly payments to cease on the grandchildren respectively attaining the age of twenty-five, and after they had attained twenty-five, then to pay the income of the real and personal estate to those grandchildren

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in the shares therein mentioned. The share, original and accruing, of any grandchild who died without leaving a child who attained twenty-one, in the income, was given over to the survivors; and upon the death of any grandchild leaving any child or children who should attain twenty-one, the trustees were to make over to such children in equal shares absolutely that share to the income of which their parent should be entitled at his or her decease; with a proviso to the effect that if any grandchild died leaving a child or children who attained twenty-one, and another grandchild afterwards died without leaving a child who attained twenty-one, the grandchild who had died leaving children should, for the purpose of the distribution of the *corpus*, be considered to have survived the one who died without issue. The will contained the following proviso: "Provided always, and I do hereby authorize and empower my said trustees hereinbefore named, and the survivors or survivor of them, and the trustees for the time being acting under this my will, from time to time, and at all or any times or time, after the decease of the husband of my said daughter, if such trustees or trustee shall in their or his discretion think fit, to advance, convey, or assign the respective shares to which my said grandsons respectively will only be entitled for life under the trusts aforesaid of and in my said real and personal estates, or any or either of such shares, or any part or parts thereof, unto them my said grandsons respectively, or to any or either of them, to hold the same unto and to the use of such grandson or grandsons, his or their heirs, executors, administrators, and assigns for ever, or according to the nature or quality thereof, and my estate and interest therein, freed and absolutely discharged from all trusts and contingencies whatsoever under this my will, anything contained in this my will to the contrary in anywise notwithstanding."

The testator died in September, 1829, leaving the above six grandchildren surviving him. The grandsons, of whom there were three, assumed the name of *Turner*. Mrs. *Merryweather* died in 1863, and her husband in 1866.

Shortly after the death of the testator a suit was instituted for carrying into execution the trusts of his will, and a decree was made.

On the 7th of April, 1868, at which time five of the grandchildren were living, the other having died without issue, the trustees of the will, in the exercise of their power, and with the sanction of the Court, declared that they would hold the eighteen-fortieth shares to which *Montagu John Turner* and *Marcus William Turner*, two of the grandsons, were then entitled for life, in the freehold, copyhold, and leasehold estates, in trust for them, their heirs, executors, administrators, and assigns, as tenants in common; and assigned to those two grandsons, as tenants in common, the eighteen-fortieth shares to which they were then entitled for life, in the funds in Court arising from sales of the real estate, and in all the personal estate of the testator.

By an order of the 12th of January, 1869, made in the above cause and in a cause for the partition of the *Woodcote* estate, which formed part of the devised estates, certain parts of the *Woodcote* estate were allotted to *Montagu John Turner*, and *Marcus William Turner*, as tenants in common in fee, in lieu of their undivided shares in the same estate, and the remainder of that estate was allotted to the trustees to be held upon the trusts of the remaining shares. This portion is hereafter referred to as the "*Woodcote* Settled Estate." By the same order, the eighteen-fortieth shares, to the income of which *Marcus W. Turner* and *Montagu J. Turner* were, previously to the exercise of the power by the trustees, entitled for life, in the funds in Court, were paid out to them.

In 1880 there were only three of the aforesaid children living —*Montagu J. Turner*, who had been a widower since 1870, was of the age of sixty-five, and had no child, *Marcus W. Turner*, who was of the age of about sixty, had been married about ten years, and had no child, and a sister.

In and prior to July, 1878, the Messrs. *Turner* had mortgaged the part of the *Woodcote* estate which had been allotted to them in 1869, and their interests in the rest of the testator's property, to several incumbrancers, to a large amount in the whole. In 1880 these incumbrancers were threatening to enforce their securities.

In 1880 an arrangement was made between the trustees and the Messrs. *Turner* that the trustees should again exercise their

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power with a view to enabling the Messrs. *Turner* to raise money on more favourable terms in order to pay off their present incumbrances, and a petition was presented in the suit to obtain the sanction of the Court to this arrangement, which provided for a resettlement of the equity of redemption. When the petition came on, counsel for the trustees stated at the bar that the trustees were willing to waive the arrangement and exercise their power over the shares of the Messrs. *Turner* in such part of the *Woodcote* estate as the trustees should think fit, and in all the remaining property. An order was accordingly made by Vice-Chancellor *Malins* on the 7th of December, 1880, by which, after reciting that the trustees were willing, and in the exercise of the discretion given to them by the testator's will thought fit, to advance, convey, assign, or transfer to the Messrs. *Turner* absolutely the shares to which they respectively were, under the trusts of the will, only entitled for their lives in the testator's real and personal estates, other than the *Woodcote* settled estate, and in such parts of the *Woodcote* settled estate as the trustees should think fit, an inquiry was directed as to the incumbrances on the shares of the Messrs. *Turner*, and an inquiry "in what manner it will be proper that the conveyance, assignment, and transfers hereinbefore authorized of the said shares to the Petitioners, should be made and carried out."

This order was not prosecuted, and on the 17th of September, 1881, Mr. *Marcus Turner* wrote to one of the trustees as follows:—

"I am sorry to be so troublesome, but I am driven to appeal to you again to kindly consent to our having our present life-interests in the trust estate converted into fee. I am sure, if I had wit enough to put the matter in its true light, you would not hesitate. I am sure you are not indifferent to the possible embarrassment we may have to face if not kindly aided, and I believe I am not wrong in saying that you think we are not at present in good hands. To release ourselves from our present mortgagees we have recently been in negotiation with the '*Scottish*' office, the solicitors acting for which are gentlemen of the highest respectability. They agreed to make the necessary advance, and the matter was fixed for completion for the 29th

inst., but it seems that by a most unwarrantable misrepresentation of the nature of the security, in part by the solicitor we had to employ in the business (which I believe he did from interested motives), they were led to believe we were in possession of the fee of all our present share in the trust estate. It is a very awkward dilemma, and may be most disastrous to us and the estate we possess, and it is to save that I now most earnestly ask you to befriend us in this matter. I believe we should be in very excellent hands with the proposed mortgagees, and all would be done that could be for the increase and improvement of the property. We have building agreements now signed embracing a rental of £1760 per annum, on an area less than 30 acres, only waiting the completion of this matter, and in a year or two very much more would be done. Any arrangement you would like to make we would willingly acquiesce in. We would resettle it if you wished, subject only to this intended mortgage, after which to revert back to your trust again, but I earnestly ask you not to suffer our present property, which is in jeopardy, to be snatched from us for want of this timely aid."

In February, 1882, the sister died without issue, so that the Messrs. *Turner* became entitled as tenants for life in equal shares to all the property of the testator, other than the portions which had been advanced to them under the exercise of the power in 1868.

The trustees took into consideration the request made by the above letter, and ultimately an arrangement was come to that the trustees (subject to the approval of the Court) should make over to the Messrs. *Turner* the *corpus* of the whole remaining property, to enable the Messrs. *Turner* to raise by mortgage of the whole of the *Woodcote* estate the sum of £70,000, or such other or further sum as the trustees might consent to, but upon condition that such mortgage or any mortgage or charge previous to the resettlement hereinafter mentioned, should not be made without the consent of the trustees or trustee, and that the moneys so raised, and the net proceeds of the sale of the other lands subject to the trust, and the funds in Court, or so much thereof as should be necessary and sufficient for the purpose, and should not be required for payment of duty, costs, and other prior liabilities, should be applied in payment of the incumbrances

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created by the Messrs. *Turner* according to their priorities, but without any obligation on the persons advancing the £70,000 to see to the application of it. And subject to the further condition that the unsettled *Woodcote* estate (viz., the parts of the *Woodcote* estate allotted to the Messrs. *Turner* in 1869) should be primarily chargeable with the amount to be raised, and that subject thereto the *Woodcote* settled estate should forthwith after such mortgage be resettled, and be conveyed to the use of the then trustees, or to the use of such persons including or not including themselves or any of them, but not exceeding altogether four in number, as they or the survivors or survivor of them should name as trustees of the resettlement, their heirs, executors, administrators and assigns, in trust as to one moiety for *Montagu J. Turner* for life, and then for his issue as he should by deed or will appoint, and in default of appointment for all his children equally as tenants in common in tail, with cross remainders in tail, and in default of such issue then upon the trusts of the other moiety, being similar trusts for *Marcus William Turner* and his issue, and in default of issue of both of them, then as to one moiety in trust for *Montagu J. Turner* in fee, and as to the other moiety for *Marcus W. Turner* in fee, and with power to each of the Messrs. *Turner* to appoint by will, to any wife who might survive him, an estate for her life, or for any less estate in the share of which he should at his death be entitled to a life estate in possession. The trustees of the resettlement were to have a power, similar to that in the will, of conveying to the Messrs. *Turner* the fee simple of their shares, and the resettlement was to contain all such other powers and provisions as the Messrs. *Turner* and the trustees of the will might agree upon, or as, in case of difference, the Court should think fit.

A petition was presented by the Messrs. *Turner* to obtain the sanction of the Court to the exercise by the trustees of their power upon the terms and conditions mentioned above, which were set out in par. 46 of the petition. On the 1st of April, 1882, Mr. Justice *Fry* gave the sanction, without the attention of the Court being called to the question whether the terms of the bargain as to resettlement were such as to make the transaction a fraud upon the power.

By an indenture of the 1st of May, 1882, made between the trustees of the one part and the Messrs. *Turner* of the other part, reciting the power given by the will of making over absolutely to the tenants for life the shares in which they had life interests, and that in order to enable the Messrs. *Turner* to pay off their incumbrances, the trustees had agreed to exercise the power over the property therein mentioned, including the settled part of the *Woodcote* estate, on condition that the Messrs. *Turner* would resettle the last-mentioned hereditaments in such manner as the trustees should approve, subject to any mortgage or charge which might be created thereon by the Messrs. *Turner* with the approbation of the trustees, the trustees conveyed (*inter alia*) the settled part of the *Woodcote* estate to the use of the Messrs. *Turner* as tenants in common in fee, subject to the existing incumbrances, in trust, so far as related to the settled part of the *Woodcote* estate, to resettle the same in such manner as the trustees or the survivors or survivor of them should approve, subject to any mortgage or charge which might previously be created thereon with their or his privity or approbation.

By a deed of the 24th of June, 1882, with the approbation of the trustees, the *Woodcote* estate and other hereditaments were vested in the *Scottish Provident Institution* as mortgagees for £80,000, the former mortgagees being paid off and concurring.

By indenture of 24th June, 1882, made between the Messrs. *Turner* of the first part, the trustees of the will of the second part, and four other persons nominated by them to be trustees of the resettlement, of the third part; reciting the above deeds of the 1st of May, 1882, and 24th of June, 1882, the Messrs. *Turner* "in pursuance of the said condition or agreement in this behalf, and of the trust in this behalf contained in the firstly hereinbefore recited indenture and in consideration of the premises," conveyed the settled part of the *Woodcote* estate (subject to the mortgage of even date) unto and to the use of the parties of the third part, their heirs and assigns, upon the trusts therein mentioned. These trusts were in accordance with the arrangement stated above, each tenant for life having a power of appointing his share after his own decease by deed or will to all or any of his children or remoter issue, and a power of appointing a life interest

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to a surviving wife. The usual powers were given to the new trustees, including a power of sale and exchange, exercisable with the consent of the Messrs. *Turner* during their joint lives, and of the survivor of them.

In October, 1882, the trustees of the settlement of the 24th of June, 1882, with the approbation of the Messrs. *Turner*, contracted to sell to a body of purchasers a piece of land forming part of the settled *Woodcote* estate. The purchasers took the objection that the attempted exercise by the trustees of the will of their discretionary power in 1882 was invalid. The vendors took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that a good title had been shewn.

The summons was heard by Mr. Justice *North* on the 4th and 6th of August, 1883, upon evidence which did not comprise all the facts above stated.

B. B. Swan, and *A. R. Kirby*, for the summons.

G. T. J. Millar, for the purchasers, referred to *Birley* v. *Birley* (1); *Pryor* v. *Pryor* (2).

Swan, in reply, referred to *Goldsmid* v. *Goldsmid* (3); *White* v. *St. Barbe* (4); *In re Huish's Charity* (5); and *Cockcroft* v. *Sutcliffe* (6).

NORTH, J., upon the evidence before him, held that a good title could not be made.

C. A.

The vendors appealed, and the appeal was heard on the 4th of December, 1884.

Cozens-Hardy, Q.C., and *B. B. Swan*, for the Appellants:—

Mr. Justice *North* held that the transaction was a fraud on the power, because there was a bargain for a resettlement under which strangers took a benefit. We contend that this does not make the appointment bad, if the settlement which is bargained for is only a way of dealing with the property for the greatest benefit

(1) 25 Beav. 299.
(2) 2 D. J. & S. 205.
(3) 2 Hare, 187.
(4) 1 V. & B. 399.
(5) Law Rep. 10 Eq. 5.
(6) 25 L. J. (Ch.) 313.

of the appointee. In *White* v. *St. Barbe* (1) an appointment upon a bargain that the appointed fund should be settled upon the appointee and her children, who were not objects of the power, she and her husband being parties, was upheld. In *In re Pocock's Policy* (2) Lord Justice *James* indicates the principle for which we contend. In *Goldsmid* v. *Goldsmid* (3) Vice-Chancellor *Wigram* states that the cases lay it down clearly that a valid appointment may be made to persons who are not objects of the power, with the approbation of the persons who are objects of the power. In *Cooper* v. *Cooper* (4) even the fact that the donee of the power acquired under the bargain a remote interest in the appointed fund was held not sufficient to invalidate the appointment. Mr. Justice *North* relied on *Birley* v. *Birley* (5) and *Pryor* v. *Pryor* (6), but in each of those cases the transaction was a scheme to settle the property for the benefit of the issue of persons who were not appointees.

[BOWEN, L.J. :—Are there any cases in which such a transaction has been supported except on a marriage?]

There was no marriage in *Goldsmid* v. *Goldsmid*. *Roach* v. *Trood* (7) is in our favour.

G. T. J. Millar, for the purchasers :—

The principle of *White* v. *St. Barbe* and the cases of that class is, that an appointment is not made invalid by the fact that the appointor knows that the appointee is going to settle the appointed property in a way including persons not objects of the power. Except *Cooper* v. *Cooper* there is no case where the appointment has been upheld if there was a binding agreement on the appointee to settle in that way.

[FRY, L.J. :—Should we not be shutting our eyes to the known course of transactions of this kind, if we did not take notice of the fact, that on a daughter's marriage the appointment to her is in fact always made on condition that she shall settle the appointed share?]

(1) 1 V. & B. 399.
(2) Law Rep. 6 Ch. 445.
(3) 2 Hare, 187.
(4) Law Rep. 8 Eq. 312.
(5) 25 Beav. 299.
(6) 2 D. J. & S. 205.
(7) 3 Ch. D. 429.

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The cases of appointments on the marriage of a child are an exceptional class, and stand by themselves. In order to avoid the great inconvenience of a contrary conclusion, the Courts have held that the appointee must be treated as free to settle or not, for the very beneficial power of appointing among children would be turned into a mischief if a daughter could not settle a share that was appointed to her on her marriage. The principle on which the case is to be decided appears from *Daniel* v. *Arkwright* (1); *Birley* v. *Birley* (2); and *Pryor* v. *Pryor* (3), the decision in the last of which cases is closely in point here. *Topham* v. *Duke of Portland* (4) carries out the principle. The test is whether the settlement is the voluntary act of the appointee. *Cooper* v. *Cooper* (5) is not within *White* v. *St. Barbe* (6), the question being whether the motive of the appointment was that the appointor should get a benefit for himself. If the transaction in the present case is held good, then any bargain may be made for the benefit of persons not objects of the power.

Cozens-Hardy, in reply:—

In *Daniel* v. *Arkwright* the appointment which was held bad was not an appointment to the daughter but a direct appointment to persons not objects of the power. The present case is analogous to the ordinary case of a marriage settlement of an appointed share.

[FRY, L.J.:—Is the bargain there by the appointee with the appointor or with her intended husband?]

It is a bargain among all three.

[FRY, L.J.:—Are those cases exceptions from a general rule or instances of the application of a general rule? If the latter what is the rule?]

That the bargain must be for the benefit of the appointee. In *Roach* v. *Trood* (7) the deed recited a bargain and yet the appointment was held good, which supports the view taken by Lord Justice *James* in *Cooper* v. *Cooper*.

(1) 2 H. & M. 95.
(2) 25 Beav. 299.
(3) 2 D. J. & S. 205.
(4) Law Rep. 5 Ch. 40.
(5) Ibid. 8 Eq. 312.
(6) 1 V. & B. 399.
(7) 3 Ch. D. 429.

Dec. 15. The judgment of *Bowen* and *Fry*, L.JJ., was now delivered by:—

FRY, L.J.:—

The facts of the case are shortly these.

William Turner, by his will, dated 1829, gave his real and personal estates to trustees to pay the rents and profits to his grandchildren, in the shares therein mentioned, during their lives respectively, with cross-remainders on the death of any grandchild without leaving a child who should attain twenty-one, and with trusts for the benefit of the children of his grandchildren. And the testator empowered his trustees, at any time after the death of his son-in-law since deceased, if such trustees should think fit, to convey and assign the respective shares to which his grandchildren should only be entitled for life under the previous trusts of his will in his real and personal estate, or any or either of such shares, or any part or parts thereof, unto his grandsons respectively, or any or either of them, to hold unto and to the use of such grandson and grandsons, their heirs, executors, administrators, and assigns, freed from all trusts under his will.

The testator died in 1829, leaving six grandchildren.

In May, 1882, there were two grandchildren only of the testator living, Mr. *Montagu John Turner* and Mr. *Marcus William Turner* (whom, for brevity, I shall call the Messrs. *Turner*), the four others having previously died without issue, and by an indenture of the 1st of May, 1882, the trustees conveyed the shares to which the Messrs. *Turner* were then entitled for life in the real and personal estates, to the two Messrs. *Turner* in fee, and they, in pursuance of an arrangement between themselves and the trustees, by an indenture of the 24th of June, 1882, re-settled a portion of the property, including the property now in question, upon certain limitations, including provisions for any issue which they might have, and with powers of jointuring any wives whom they might marry, and containing also a power of sale in the trustees of the re-settlement.

The vendors in the present case are these trustees acting under this power of sale. The wives and issue of the Messrs. *Turner* are not objects of the power conferred on the trustees by the will,

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and accordingly it is objected that the appointment and re-settlement of 1882 constitute together a bad exercise of the power, and that the vendors cannot shew a good title.

In the present case the trustees have plainly acted with perfect good faith in what they have done; they have reserved no benefit, direct or indirect, to themselves; they have acted with no concealed or indirect object in what they have done; and the only objection raised is this, that they have imposed the re-settlement of a portion of the lands by the appointees as a condition of their exercise of the power, and thereby have secured benefits to possible persons not objects of the power.

It appears to us to be plain that the mere conferring of a benefit upon a person not an object of the power will not avoid the exercise of the power, if made with the approbation of the real objects of the power: see *Sugden* on Powers (1); or even if made with the approval of the person who would take under an exercise in favour of the object of the power, as in the case where an appointment was made to a married daughter, and she and her husband re-settled it, giving benefits, not only to their children, but to a stranger to the family: *Wright* v. *Goff* (2); or where the appointment was made upon the usual terms of a marriage settlement on the occasion of the marriage of an infant daughter: *Fitzroy* v. *Duke of Richmond* (3).

It appears to us to be further plain that the mere existence of an antecedent contract between the donee of the power and the appointee for a re-settlement conferring benefits on a stranger is not enough to invalidate the appointment. In *Langston* v. *Blackmore* (4), decided by Lord *Hardwicke* in 1755, there was a distinct bargain between the father and the eldest son as to the whole transaction, the eldest son agreeing to pay £80 to his father, and £50 to a younger brother, and the father giving up a life interest in a moiety of the property which was then appointed by the father upon the usual trusts of a marriage settlement on his eldest son: and in like manner in the recent case of *Roach* v. *Trood* (5), there was a bargain in fact between the father and the son, acceded to by the son before the appointment could take effect.

(1) 8th Ed. p. 670.
(2) 22 Beav. 207.
(3) 27 Beav. 190.
(4) Amb. 288.
(5) 3 Ch. D. 429.

Again, in *Cooper* v. *Cooper* (1) Vice-Chancellor *James* said: "Taking the whole thing together the bargain is this: 'I will appoint to you £5000 out of the settled fund, provided you will enter into a bargain with me that if I pay down directly £5000 more, you will give me a contingent reversion in the first sum,'" and the Vice-Chancellor then proceeded to consider the character of the bargain thus entered into.

But if the Court finds not only that there was an antecedent contract, but that that contract was the *causa sine quâ non* of the appointment, or, to use the language of Lord *Romilly* in *Birley* v. *Birley* (2), "the reason of the appointment being made to the appointee," or, to use the language of Lord Justice *Knight Bruce* in *Pryor* v. *Pryor* (3), "if the just result of the evidence is that the appointment would not have been made but for the bargain," then the case is different, and the appointment is bad.

Now in the present case we conclude that there was an antecedent contract for the re-settlement—a contract created by way of a condition imposed by the appointors, and acceded to by the appointees, before the appointment.

But is it shewn that this contract was the reason for the appointment, or that if the contract had not existed the appointment would not have been made? To answer that question we must look at all the circumstances of this case.

It appears that in the year 1882 *Montagu J. Turner* was about sixty-seven years of age, a widower since 1870, and without issue: that Mr. *Marcus William Turner* was aged about sixty-two years, and had been married to his wife about twelve years, and was without issue, and that, as already stated, all the other grandchildren of the testator were then dead without issue.

It further appears that, in the year 1868, the then trustees of the settlement, acting with the approval of the Court of Chancery, exercised their discretionary power in favour of the two grandsons in question by appointing to them the absolute interest, subject only to certain subsisting mortgages and contracts, in the eighteen-fortieth parts of the real and personal estates of the testator in which they were then interested for life.

(1) Law Rep. 8 Eq. 322. (2) 25 Beav. 307.
(3) 2 D. J. & S. 210.

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By the deaths of two sisters without issue between 1868 and 1880 other shares became vested for life in the two Messrs. *Turner*, and in that year an arrangement was come to between the then trustees and Messrs. *Turner*, the object of which was that the trustees should again exercise their discretionary power in favour of the Messrs. *Turner* with a view of enabling them to raise a large sum of money, and then to re-settle the *Woodcote* settled estate in moieties for the benefit of the two Messrs. *Turner* and their respective children and issue. The arrangement was of a very complicated description, and a petition stating it in detail came on before Vice-Chancellor *Malins* on the 7th of December, 1880, and then the trustees, instead of insisting on the particular arrangement embodied in the petition, and to which they had previously come, stated at the bar that they were willing, and in the exercise of their discretion thought fit, to convey and assign to the Messrs. *Turner* the shares to which they were then respectively entitled for life in the property other than the *Woodcote* settled estate, and in such part of that estate as they, the trustees, should think fit, and upon this statement at the bar the Vice-Chancellor directed an inquiry as to the incumbrances affecting the shares of the Messrs. *Turner*, and further, an inquiry in what manner it would be proper that the conveyance and assignment of the shares to the Messrs. *Turner* should be made and carried out.

Instead of prosecuting this inquiry, Mr. *Marcus Turner* addressed a letter in September, 1881, to the trustees of the settlement urging the trustees to exercise the power in question in favour of his brother and himself, to enable them to carry into effect a scheme for the consolidation of their incumbrances and to relieve them from a difficulty created by a representation made by their solicitor that they were the absolute owners of all the shares under the will in which they were interested, and in the letter Mr. *Marcus Turner* said, "We would re-settle it if you wished subject only to this intended mortgage, after which to revert back to your trust again." Before anything was concluded from this proposal, in February, 1882, the sole surviving sister of the Messrs. *Turner* died without issue, and thus again their life interests in the property were enlarged. The result of the negotiation was the deeds of 1882 which we have already stated, and

which state the re-settlement as a condition of the willingness of the trustees to exercise their discretionary power.

Now what is the true result of this evidence on the transaction in question? We think it is that the bargain made antecedently to the appointment was not the reason of the appointment, but that the appointment would have been made whether the bargain had been made or not. We think that the conduct of the trustees from 1868 downward shews that a desire to benefit the Messrs. *Turner* was the primary motive and object in the minds of the trustees, and we find in the all but unconditional way in which the trustees placed themselves under the direction of the Court as to the exercise of this power on the hearing of the petition in 1880, after they had settled the terms of an elaborate bargain between themselves and the Messrs. *Turner*, cogent evidence to shew that the trustees considered the conditions to be imposed on the appointment as of little or no moment in considering whether an appointment should or should not be made. If the inquiry directed by Vice-Chancellor *Malins* had been prosecuted instead of being waived, the trustees might have found themselves obliged to make an unconditional appointment in favour of the Messrs. *Turner*. Furthermore, the first suggestion of a re-settlement comes from Mr. *Marcus Turner*, and not from the trustees, and the incidental way in which he puts it forward goes to shew that he did not consider it as likely to be regarded by the trustees as of any considerable or decisive importance.

On the whole, therefore, we conclude that it is not shewn that the condition or bargain induced the appointment, and we therefore feel constrained to allow the appeal with costs here and below.

BAGGALLAY, L.J.:—

I was not present at the argument of this appeal, but at the request of my colleagues I have perused and carefully considered their judgment and consulted the authorities, and I entirely concur in the conclusion at which they have arrived.

Counsel then stated that the evidence before the Court of Appeal was different from that before Mr. Justice *North*, and that

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the new evidence had been admitted under an agreement which provided for the costs of the appeal, and asked that the order as to costs might follow the agreement.

THE COURT assented to this request.

Solicitors for vendors: *Hine-Haycock & Bridgman.*
Solicitors for purchasers: *Walker & Mewburn Walker.*

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[1884 H. 3060.]

Windfalls—Larch Trees—Settlement—Tenant for Life.

An estate which comprised larch plantations was settled as personalty by the medium of trustees for sale. The trustees had power to pay all outgoings, and to determine what part of the property was *corpus* and what income. A large number of trees were blown down by extraordinary gales, and the plantations were so much injured that it became necessary to clear and replant the ground.

The income from the plantations was derived from thinnings, and varied considerably according to the age of the trees. The trees blown down were about thirty-five years old, and in ordinary course would have come to full maturity in fifteen or twenty years, and they would then have been cut down and the ground cleared and replanted.

Held, that the proceeds of the sale of the larch trees blown down and felled by reason of the gales did not belong to the equitable tenant for life, but must be invested by the trustees. But the Court, having regard to the average income which would have been derived from the plantations if no gales had occurred, fixed an annual sum to be paid to the tenant for life out of the income, and, if necessary, the capital of the invested fund; subject to the right of the trustees to have recourse to the fund in order to replant the plantations.

BY an indenture dated the 18th of August, 1871, made in contemplation of the marriage of *George Day Harrison* and *Marianne Emma Day*, the *High Dale Park* estate, situate at *Hawkshead, Lancashire*, was conveyed, subject to the life estate of *Matthew Benson Harrison*, the father of *George Day Harrison*, to *William Mayd* and *Matthew Shaw*, upon trust after the death of the said *Matthew Benson Harrison*, at the request in writing of the

said *George Day Harrison* and *Marianne Emma Day*, during their lives, or the survivor of them during his or her life, and after the death of such survivor at the trustee's discretion, to sell the said premises, and after paying incidental expenses to hold the moneys arising from such sales and also the rents and profits of the said hereditaments, or of the unsold part thereof, for the time being upon such trusts and with and subject to such powers, provisoes, agreements, and declarations as are declared by an indenture of even date. The conveyance contained a power for the trustees to lease for twenty-one years, at any time before the sale should have taken place.

By the last-mentioned indenture certain personal estate was assigned to the trustees *William Mayd* and *Matthew Shaw*, and it was declared that they should stand possessed thereof and of the proceeds of the sale of the *High Dale Park* estate upon trust to invest the same and pay the annual income thereof to the said *George Day Harrison* during his life, and after his death to the said *Marianne Emma Day* during her life or until she should marry again, and after her death in trust for their issue as therein mentioned. And it was also declared that until all of the *High Dale Park* estate should have been sold, the trustees should pay or apply the rents and profits of the hereditaments and premises, or so much of them as should not have been sold, "after payment thereout of all rates, taxes, payments for insurance against fire, costs of repairs, and other outgoings," which the trustees should think fit to pay, to the persons to whom the income of the invested funds would be payable. And power was given to the trustees to determine what part of the property should be considered as *corpus* and what as income.

Matthew Benson Harrison and *George Day Harrison* were both dead, and the widow of the latter, who was the applicant on this summons, had, as equitable tenant for life, been receiving the income of the *High Dale Park* estate. *G. D. Harrison* died in 1880, and the applicant was about thirty-six years of age.

The estate consisted of about 434 acres, of which 170 were larch plantations. For many years a portion of the income of the estate had been derived from the annual thinning of the larch plantations, and the sale of the larch trees so cut down:

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this for the last five years had averaged rather more than £400, and for the last three years about £500. The income of the rest of the estate was about £805 a year. The larch plantations had been cultivated in the manner customary in the country, that is to say, the land intended to be planted having been inclosed and properly prepared, young larches are planted to about 2500 to an acre. For the first fifteen years the young trees are pruned and thinned, but there is no profit from them, and very little from the land on which they are planted, but when the trees attain the age of fifteen years they are regularly thinned, in order to allow the proper growth of the trees not cut. For about five years the thinnings are of comparatively little value, but when the trees are about twenty years old the thinnings are sold for prop wood in coal mines, and the pasturage in the plantation improves from the thinning. In another ten years the remaining trees begin to mature and become fit to be used as "pit-wood" for the hematite iron ore mines in the neighbourhood, and from that time till they are about fifty years old the plantations are thinned regularly for that purpose. At that time it becomes advisable to clear and replant, and the same process is repeated.

During the winter of 1883–1884, three gales of unprecedented severity occurred, by which a very great number of the larch trees on the *High Dale Park* estate were blown down, and the damage done was so great that, with the exception of between thirty and forty acres on which the plantations were comparatively uninjured, it was advisable, in the opinion of Mr. *Jones*, the estate agent, who managed the plantations, to clear and replant all the plantations. According to the estimate of Mr. *Jones* the value of the trees blown down was about £4500, and the value of the standing trees which it would be advisable to clear was approximately £1500, and in his opinion, having regard to the facilities of sale in the district, the whole proceeds might be realized in four or five years. He estimated the cost of replanting at £500, and considered that for some years a reduction of rent would have to be made to the tenants in respect of loss of pasturage. He recommended that the replanting should be done as soon after clearing the plantations as possible. He was of opinion that but for the disastrous gales about the same income would have been derived

from the plantations for the next two or three years as had been got for the last three years, and that after that a smaller income for perhaps twenty years, when the time for beginning to clear for replanting would arrive.

This was an originating summons taken out by the tenant for life to determine: first, whether as tenant for life under the said settlement she was entitled to the entire net proceeds of sale of the larches blown down, and of those which it was advisable to cut in order to clear the ground for replanting, or if not, how such moneys should be dealt with; secondly, whether, having regard to the trusts of the settlement, any and what provision should be made for replanting the plantations, or any part thereof, and how the cost of such replanting should be provided for.

The summons came on for hearing before Mr. Justice *Pearson* on the 30th of October, 1884.

James Kaye, for Mrs. *Harrison*:—

If the larch trees are treated as timber, the tenant for life is entitled to all trees blown down by the wind, and also to cut and have the profit of trees proper to be cut for the benefit of the estate: *Honywood* v. *Honywood* (1); *Bateman* v. *Hotchkin* (2). If they are not treated as timber, they are a crop to the profits of which the tenant for life is entitled. If these trees had lived till they were matured, she would have been entitled to the produce of the sale of the whole plantation. If the tenant for life is not entitled to have the whole proceeds of the trees, she ought to have her income kept up to what it would have been if the disaster had not occurred, that is to say, the purchase-moneys should be invested and a sufficient part of the securities sold from time to time in order to make up the average income, in the same way as, where a lease has been taken under the *Lands Clauses Act*, the income of a tenant for life is kept up.

Fellows, for the infant remaindermen:—

The tenant for life under such a settlement as this is only entitled to the real annual income of the property. Such a fall of trees as has occurred in the present case is capital and ought

(1) Law Rep. 18 Eq. 306. (2) 31 Beav. 486.

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to be applied as such for the benefit of those coming after as well as the present tenant: *Bateman* v. *Hotchkin* (1); *Tooker* v. *Annesley* (2). The replanting that is advised is an outlay within the meaning of the settlement that the trustees are bound to make. The larch trees cannot be treated as a crop: they do not grow again from the stools like ordinary coppices.

Ribton, for the trustees:—

It is my duty to point out that the authorities are confined to cases where there is a legal estate for life.

Kaye, in reply:—

The tenant for life is in the same position as if she had a legal estate, for the trust for sale cannot be exercised without her consent. If she had had a legal estate, even if the trees had been timber trees, she would have been entitled to the cuttings, subject to keeping up the plantations.

Nov. 8. PEARSON, J. (after stating the facts):—

The question that I am asked is this. The larch trees that have been blown down are valued at £4500. It is said that it is advisable to sell the trees on other parts of the plantations so as to put them into working order, and that the value of the larch trees cut down for that purpose will be something like £1500. There are two questions put to me, or, if one be subdivided, I may say three. The first is, what is to be done with the £4500, the proceeds of those trees that have been blown down. The second is, what is to be done with the £1500, the proceeds of those larch trees which it is necessary to fell in order to clear the plantations so as to put them in a state in which they can properly be cultivated. The third is, whether or not any part of the money ought to be expended in replanting for future generations.

With regard to the widow's interest, in the first place it is said, possibly she is entitled to the whole of both those sums. Secondly, it is said, if she is not entitled to that, she may be entitled to have the money applied in such way that out of the capital sums of £4500 and £1500 she may receive the same annual income as has

(1) 31 Beav. 486. (2) 5 Sim. 235.

been received from the larch plantations on an average of a sufficient number of years. Thirdly, it is said you can treat it in another way; you may simply invest the £4500 and the £1500, and give her the income of the money so invested.

The first proposition, namely, that she is entitled to the £4500 and the £1500, arises from the fact that the trees are larch and not timber. But when I come to consider what her position is I must bear in mind the manner in which this property is settled, and that she has no legal estate whatever in the property. The property is conveyed to trustees upon trust in the first place to pay the income (which of course would be the proceeds from the larch plantations, keeping them according to the proper course of cultivation) to the tenant for life for the time being, subject to the payment, amongst other things, of all outgoings. The settlement is very brief indeed, but it is to this effect, "To pay such outgoings as the trustees may think fit to pay." Now, in the original deed of conveyance there is a power to lease for twenty-one years, and to my mind that is a very important clause in that it shews what was the intention of the parties to the settlement. I cannot help thinking that this is a case in which the Court ought to be guided by that which on the face of the instruments appears to be the intention of the parties, and it certainly never was the intention of the parties that all those larch trees should be cut down in any one particular year, so as to give the tenant for life during that year a very large bonus, if I may use that expression.

It seems to me that to say the property was to be sold, and to deal with the plantation in that way, would be a grievous breach of trust, because after cutting down the trees a much smaller sum would be realised from the sale of the estate than from a sale with the larch plantations on it, and even if there had been a power under the deed to purchase other land, the result would be that by buying other land with plantations on it, and dealing with that in the same way, you would by degrees have dribbled away the whole of the fortune intended to be settled, not only on the husband and wife, but also on the children coming after them.

I think, therefore, looking at the fact that this was a settlement

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upon the trusts I have mentioned, that there was no legal estate in the beneficiaries, that there was the power to lease for twenty-one years in the original conveyance, that in the second deed there was a power to the trustees to defray such outgoings as they might think fit, the proper construction of both these deeds is that the larch plantations were intended to be dealt with as plantations, and to be kept as plantations, so that they would descend to the children when the husband and wife were dead, as existing plantations, and not merely as bare ground.

The result is this, that the duty of the trustees would be to renew these plantations according to the ordinary course of cultivation. That would have been their duty if no larch had been blown down, and the simple fact that by a tempest many have been blown down, does not, in my opinion, alter the duty of the trustees.

I think, therefore, the lady is not entitled to receive the whole £4500, or the £1500. I think also, looking to the fact that I come to the conclusion that the property was to go as uninjured as it could be to whoever succeeded the tenant for life, that she is not entitled to have the £4500, or the £1500, applied to making good such income as she would have received if the larch plantations had existed.

All therefore that can be done is this, to order the trustees to expend so much money as is necessary for properly renewing the plantations and keeping them as plantations, to invest the residue of the money, and to pay to the lady the interest on the money invested.

D. P.

C. A.

From this judgment Mrs. *Harrison* appealed. The appeal came on for hearing on the 12th of December, 1884.

James Kaye (*Rigby*, Q.C., with him), for the Appellant.

Fellows, for the infant remaindermen.

Ribton, for the trustees.

The same arguments were used and the same cases cited as in the Court below.

After the conclusion of the arguments Mr. *Jones*, the estate agent, was examined before the Lords Justices, and corroborated the evidence which he had previously given. He further stated that the trees were now about thirty-five years old; that the income from the thinnings for the last two or three years had been about £500, but that the average income from the plantations since the date of the settlement had been about £200; that if no storms had occurred the probable income from the thinnings would have been about £500 for two or three years longer, that the income would then have fallen to about £250 for about fifteen years, and then it would have become necessary to begin to clear the plantations. After the clearing, the plantations would have to remain bare for three or four years, and then would be replanted. He also stated that the herbage under the trees was let for feeding sheep at about 4*s.* an acre.

The counsel on both sides having declined to make any comments on the fresh evidence,

BAGGALLAY, L.J., said:—

This is an appeal from a decision of Mr. Justice *Pearson* under somewhat singular circumstances. Upon an estate, on the borders of *Lancashire* and *Westmoreland*, there was a considerable plantation of larch, and, by a succession of severe storms, last winter, a large proportion of the trees were blown down, to the value of £4500, others being left uninjured, but of much less value. When the case came before Mr. Justice *Pearson*, there were two questions for his decision: the one, how the estate should be worked, or rather how this portion of the estate, should be worked, in the years to come; the other, what were Mrs. *Harrison's* rights as tenant for life in respect of the produce of the trees. [His Lordship then stated the facts and the effect of Mr. *Jones'* evidence, as above set forth, and continued:—]

I need hardly say that it has been repeatedly decided in this and other Courts that larch trees are not timber. They are not subject to the same rules as timber trees are. We all know that oak and ash are timber everywhere. There are other kinds of trees which are timber trees by custom in some parts of the country and not in others, such as birch, and, I believe, beech. There is this peculiarity as regards larch plantations, that you

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cannot leave what is called the stool to throw up future shoots, which may form the subject of cutting from time to time afterwards, but when once cut, there is an end of them, there is no second growth from the old stool.

Now the rule, as far as regards the produce of timber trees when they have been blown down, has gone this length, that in the absence of any improper conduct on the part of the tenant for life, the produce of the trees is treated as capital, and the income allowed to the tenant for life. Where there has been irregularity of conduct on the part of the tenant for life, leading to an improper thinning of trees, then the severe rule of the Court has not unfrequently been put in force, and he gets no interest for his life, but the whole of the produce is carried to capital, and, no doubt, on the ground that in cases of that kind the capital has been reduced by reason of the cutting before the timber was ripe for the purpose.

The view taken by Mr. Justice *Pearson* was this. He seemed to liken the case to one of the loss or destruction of timber or timber trees accidentally during a tenancy for life. I say "accidentally" as distinguished from loss by any improper act, any waste committed on the part of the tenant for life. He says, "I think, therefore, looking at the fact that this was a settlement upon the trusts I have mentioned, that there was no legal estate in the beneficiaries, that there was the power to lease for twenty-one years in the original conveyance, that in the second deed there was a power to the trustees to defray such outgoings as they might think fit, the proper construction of both these deeds is that the larch plantations were intended to be dealt with as plantations, and to be kept as plantations, so that they would descend to the children when the husband and wife were dead, as existing plantations, and not merely as bare ground." Now upon this part of the case I do not quite take the same view that Mr. Justice *Pearson* did; because, bearing in mind the fact that these trees would begin to be fit to cut at fifty years of age, and that you cannot well replace them for a certain lapse of time, I think it is putting a rather stronger construction than I should put on the settlement, to say that the intention was that the plantations were to be kept as plantations, so that they would descend to the children. These trees being from thirty to thirty-

five years old when this action was commenced, and the tenant for life being under the age of forty, in all probability, according to the ordinary duration of life, this timber would nearly all have been cut before the time when the property would become the property of this lady's children. It could hardly be conceived that this plantation should be kept as a plantation for the children, though, possibly and probably, if the trees were all cut and removed, the new plantation made in its place might be coming to the children; but, having regard to the ordinary duration of life, the plantations that would be in existence at this lady's death would be very young plantations indeed, and not plantations which would be sufficient to produce the large amount that the timber which has been blown down will produce.

However, Mr. Justice *Pearson* goes on, "The result is this, that the duty of the trustees would be to renew these plantations according to the ordinary course of cultivation. That would have been their duty if no larch trees had been blown down, and the simple fact that by a tempest many have been blown down, does not, in my opinion, alter the duty of the trustees." In that I entirely concur. I think that the cultivation of this estate should go on exactly as it would have done in accordance with the general custom of managing property of this kind, and in the same way as if there had been no accident such as has been described. Mr. Justice *Pearson* proceeds: "I think, therefore, the lady is not entitled to receive the whole £4500 or the £1500." There again I entirely agree with him. It seems impossible to hold that the bare produce of the timber which has so fallen and which is to be felled shortly in the course of cultivation should go to this lady, because it has not been the result of ordinary events but of an accident. He goes on to say, "I think also, looking to the fact that I come to the conclusion that the property was to go as uninjured as it could be to whoever succeeded the tenant for life, that she is not entitled to have the £4500 or the £1500 applied to making good such income as she would have received if the larch plantations had existed." I am unable to concur with Mr. Justice *Pearson* in that view. And for this reason. We have had the benefit now of the evidence of Mr. *Jones* on this point, and, speaking in round figures, I think the effect of his evidence was this, that something like £200 has

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been the annual yield from this estate. It had been, no doubt, as much as £500 for two or three years preceding the time of the accident; but, without going more particularly into what occurred before, the effect of the evidence was this, that for the two next years the yield would probably be as much as £500 a year, and that then for a period of several years further it would be at the rate of £250 a year. That would represent an income for two years at £500, and for another fifteen of something like £250. After that, there would be no income received from it until all the trees had been cut down. It is a little difficult to follow all these figures out except with a view to arrive at something like an average. If you exclude interest arising from the excess of income beyond what would be the allowance, and carry the probable produce over forty-five years, it would be something like £200 a year. On the other hand, bearing in mind that for many years there would be an excess of interest beyond the amount allowed, I have come to the conclusion that the just and equitable arrangement would be to make an allowance to this lady, in respect of the larch plantations, at the rate of £250 a year, and to direct that, if necessary, that sum should be made up by a sale of an adequate portion of the capital. That must, unless this lady lives very far beyond the ordinary period of life, still leave a considerable amount for the children. And, if she does live an additional period of time, which we all hope she may do, the newly-planted estate will become a very valuable estate for her children, and they will get the benefit in that way. I think the directions given by Mr. Justice *Pearson* in his judgment as to the management of the estate should be adhered to, and that we must order the trustees to expend so much money as is necessary in properly renewing the plantations and keeping them as plantations, and to invest the residue of the money, and then to make to the lady the allowance I have mentioned.

Lord Justice *Fry* has been good enough to sketch out the form of order, which will give effect to what I have intended to say, as follows:—Let the income arising from the 170 acres of larch plantations in the ordinary course of management, and also the income arising from the investments of the windfall, be paid to Mrs. *Harrison*. But if in any year the sum of such incomes shall exceed the £250 a year, let the excess be invested by the trustees,

and if in any year the sum of such incomes shall fall short of £250, let the deficiency be raised out of the investments and be paid to Mrs. *Harrison*. This order to be without prejudice to the rights of the trustees to have recourse to the investments or income of the larch plantations for the purpose of fresh planting of larch. The order will apply during the whole of the lady's life or widowhood.

BOWEN, L.J.:—

I am of the same opinion. I have not heard the argument of the learned counsel in this case, but I have discussed the matter with my colleagues, and the judgment is one in which I fully concur.

FRY, L.J.:—

I am of the same opinion. I have come to this conclusion from three principal things; the first is the declaration contained in the settlement, which gives power to the trustees to determine what is income and what is capital; secondly, the course of dealing with the estate, which the trustees have, I think, very rightly pursued, and in which they have treated the thinnings and fellings of larch trees as income to be paid to the tenant for life; and, thirdly, I rely on that principle which is followed in Courts of Equity, by which, so far as may be, they struggle to prevent accident interfering with the rights of parties. Putting these things together, it appears to me that we must endeavour to place the tenant for life and the children who are entitled in remainder in the same position, so far as we can, as if the trustees had continued the management of the estate and the payment of the income in the same manner as they have hitherto carried it on, and as if this windfall had not occurred. It must be understood that this order does not interfere with the introductory part of Mr. Justice *Pearson's* order with regard to the management, and that it only varies the other part of the order.

Solicitors for Applicant: *Pemberton & Garth.*
Solicitors for Respondents: *Mills, Dowson & Co.*

M. W.

C. A.
1884
Dec. 19.

EBRARD *v.* GASSIER.

[1884 E. 4080.]

Practice—Security for Costs—Plaintiffs out of Jurisdiction—One of several Plaintiffs coming within Jurisdiction before Appeal.

An action was brought by a mercantile firm, all the members of which were in *America*, against a firm at *Manchester*. The Defendants put in a defence and counter-claim, and then applied to the Judge for an order for the Plaintiffs to give security for costs. The Plaintiffs filed an affidavit stating that they with other persons carried on business at *Manchester*, and that the firm there had assets amounting to £2000. The Judge refused the application. On the appeal the Plaintiffs produced an affidavit stating that since the order one of the Plaintiffs had come to *Manchester* for the purpose of carrying on the action :—

Held, by the Court of Appeal, that the affidavit as to the property of the Plaintiffs in *England* was ambiguous and was not sufficient to support the order in the Court below.

But *held*, that as one of the Plaintiffs had come to *England* since the order was made, although for a temporary purpose, the Defendants were not entitled to security for costs, and therefore the order must be affirmed.

Redondo v. *Chaytor* (1) followed.

THE action in this case was commenced on the 9th of January, 1884, in the Chancery Court of the County Palatine of *Lancaster*, by the Plaintiffs, who were a firm of merchants carrying on business in the city of *Mexico*, against the Defendants, who were commission agents in *Manchester*, claiming an account of all dealings and transactions between themselves as principals and the Defendants as agents, on the footing of an alleged agreement between them dated the 7th of April, 1873.

The Defendants, on the 31st of October, 1884, put in a defence in which they submitted to account, but denied the alleged agreement, and contended that the accounts should be taken on a different footing. They also put in a counter-claim, claiming against the Plaintiffs an account of the dealings between them since the 30th of June, 1882, including the price of certain goods and certain losses referred to in the counter-claim.

On the 24th of November, 1884, the Defendants moved before

(1) 4 Q. B. D. 453.

the Vice-Chancellor of the county palatine that the Plaintiffs might give security for costs, on the ground that they were residing out of the jurisdiction of the English Courts.

It appeared from the evidence adduced that one of the Plaintiffs, *J. B. Ebrard*, resided in *France*, and his co-Plaintiffs in *Mexico*. The Plaintiff *J. B. Ebrard* put in an affidavit in which he stated that the Plaintiffs, together with other persons, carried on business at *Newton Street*, in *Manchester*, as commission agents, and went on to state as follows: "The Plaintiffs' firm has assets, credits, and effects at *Newton Street* aforesaid, which the Defendants can seize in execution to satisfy any judgment of this Court or any costs awarded against the Plaintiffs if they should not succeed in the trial of this action, to the extent of £2000 and upwards; the Plaintiffs' firm have also a cash capital at their bankers in *Manchester* of the value of £2000 and upwards, and are otherwise possessed of credit and effects more than sufficient to satisfy any claim that may be made against them for any costs or any judgments which the Defendants may recover against them."

The Vice-Chancellor dismissed the motion with costs.

On the 11th of December, 1884, the Plaintiffs gave notice of appeal from this decision.

On the 18th of December the Plaintiff, *J. B. Ebrard*, filed an affidavit stating that on the 4th of December he came to *Manchester* for the *bonâ fide* purpose of prosecuting his claim in the action, and had brought his wife and family and servants with him in order that he might be enabled to stay in this country for a long period of time, and that he had no present intention of leaving this country. He also stated that his co-Plaintiff *Edouard Ebrard* had left *Mexico* for *Manchester* for the like purpose of prosecuting the Plaintiffs' claim in the action, and that he was expected to arrive from *New York* on about the 21st of December.

Ambrose, Q.C., and *Hopkinson*, for the Appellants:—

The Vice-Chancellor proceeded upon the assumption that the Plaintiffs have sufficient property in *England* to satisfy the Defendants' cost, if the result of the trial should be in their favour; but the Plaintiffs' affidavit is ambiguous and unsatisfactory on this point. It only states that the Plaintiffs are in partnership

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with other persons in *Manchester*, and that the Plaintiffs' firm, that is the *Manchester* firm, has certain assets in this country; but the Plaintiffs' interest in these assets is subject to the liabilities of the *Manchester* firm, and is too variable and uncertain to form a security for the Defendants' costs.

Clare, and *Neville*, for the Plaintiffs:—

Our first objection to the Defendants' application is that they have put in a counter-claim in which they have set up a fresh issue and have constituted themselves for that purpose Plaintiffs: *Winterfield* v. *Bradnum* (1).

In the second place, the Plaintiffs have shewn that they have property within the jurisdiction. If they have such property the nature of it is immaterial.

In the third place, one of the Plaintiffs is within the jurisdiction, and that is sufficient: *Sykes* v. *Sykes* (2). It may be true that he has only come for the purpose of prosecuting this action, but the presence in *England* for a temporary purpose is sufficient: *Redondo* v. *Chaytor* (3).

Ambrose, in reply:—

Redondo v. *Chaytor* was decided with reluctance by the Judges, and the principle ought not to be extended to a case where one only of the Plaintiffs has come to *England*. It is distinguishable also from the present case on the ground that here the Plaintiff was not in *England* when the action was commenced. Moreover he was out of the jurisdiction when the Vice-Chancellor made his order, and the Court has now to determine whether that order was correct at the time when it was made. If it was not, the appeal must succeed whatever may have happened since.

BOWEN, L.J.:—

This was an appeal from a decision of the Vice-Chancellor of the County Palatine of *Lancaster*, dismissing the appeal of the Defendants for an order that the Plaintiffs should give security for costs. The Plaintiffs are merchants in *Mexico*, and all of them

(1) 3 Q. B. D. 324. (2) Law Rep. 4 C. P. 645.
(3) 4 Q. B. D. 453.

were resident abroad at the time when the action was brought. The action is brought against an English firm who are their correspondents to have certain accounts taken between them, and the method of taking these accounts is a matter of dispute between the parties which will have to be decided hereafter. The Plaintiffs being abroad were *primâ facie* bound to give security for costs, and if they desired to escape from doing so they were bound to shew that they had substantial property in this country, not of a floating, but of a fixed and permanent nature, which would be available in the event of the Defendants being entitled to the costs of the action. The case is peculiar in this respect, that the circumstances are different now from what they were at the time of the application in the Court below. The Plaintiffs at the date of the order appealed from were all resident abroad, and in order to escape from their liability to give security for costs they filed an affidavit for the purpose of shewing that they had available property within the jurisdiction of the Court. That affidavit was drawn to meet the circumstances of the case and was most carefully framed. Affidavits are drawn by skilful professional persons, and should be judged accordingly. It is clear that the property referred to in this affidavit affords no real security to the Defendants. It is not property of any fixed amount; what is left of it may be quite insufficient to satisfy the costs if the action should be decided against the Plaintiffs. Therefore, if this appeal were to be decided on the affidavits which were before the Vice-Chancellor, we should probably have ordered the Plaintiffs to give security for costs on the ground that the Plaintiffs' affidavit was ambiguous and insufficient; but the circumstances have changed since the order of the Vice-Chancellor was pronounced. One of the Plaintiffs has come within the jurisdiction of the Court and says that he is here for the purpose of carrying on the action, and another Plaintiff is said to be on his way to *England*. The latter circumstance is in my opinion immaterial, but the fact of one of the Plaintiffs being now within the jurisdiction brings the case within the authority of *Redondo* v. *Chaytor* (1), where the Court with great reluctance decided that a foreigner usually residing abroad, but temporarily residing in *England* for the

(1) 4 Q. B. D. 453.

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purpose of enforcing his claim by action, cannot be called on to give security for costs.

A distinction however has been drawn between that case and the present on two grounds. In the first place it is said that only one of the Plaintiffs has arrived within the jurisdiction—but if when the action was originally brought one Plaintiff had been within the jurisdiction and the others abroad it is admitted that the Court could not have ordered the Plaintiffs to give security for costs; and if that be so, it seems to make very little difference that the Plaintiff who is within the jurisdiction came to *England* after the writ was filed. I do not think the distinction is sufficient.

In the second place it is said that *Redondo* v. *Chaytor* (1) only applies where one of the Plaintiffs is within the jurisdiction when the application for security for costs is made; whereas here the Plaintiff *Ebrard* was abroad when the application was made to the Vice-Chancellor, but has come to *England* before the appeal was heard. But I think it cannot be maintained that there is a hard and fast rule that a plaintiff can only take advantage of the rule in *Redondo* v. *Chaytor*, if at the very moment when the application is made he is within the jurisdiction. As Lord Justice *Fry* suggested in the course of the argument, the true test must be, whether he is in *England* when the judgment is given. I sympathize with what Lord Justice *Bramwell* said in *Redondo* v. *Chaytor*, as to the apparent injustice of the general rule, but it is better to keep to the old ways than to make a new practice from moment to moment. The appeal must therefore be dismissed; but as the case has been decided on new materials, we think the costs of the appeal should be costs in the cause.

FRY, L.J.:—

I am of the same opinion, but I have come to that conclusion not without reluctance. I bow to the decision in *Redondo* v. *Chaytor*, and I can see no real distinction between that case and the present.

Solicitors: *Sale, Seddon, Hilton, & Lord, Manchester; W. Lee, Manchester.*

(1) 4 Q. B. D. 453.

M. W.

CHARLTON *v.* ROLLESTON.

[1874 C. 265.]

C. A.
1883
KAY, J.
June 30.
C. A.
1884
Oct. 30;
Nov. 1, 10.

Lands Clauses Act (8 & 9 *Vict. c.* 18), *ss.* 80, 85 [*Revised Ed. Statutes, vol. ix., pp.* 646, 648]—*Costs—Entry on Land—Abandonment of Railway—Costs of "Taking Land."*

A railway company gave notice to treat for a piece of land, and no agreement having been come to with the owners, they entered on the land under the powers of the 85th section of the *Lands Clauses Act*, and paid the deposit into Court. Afterwards the company obtained an Act by which they were empowered to abandon that part of their undertaking, but it was enacted that the abandonment should not prejudice any landowner's rights to compensation for damage done by entry and occupation, and that the compensation should be determined in the manner provided by the *Lands Clauses Act*. The owners of the land then entered into an agreement with the company fixing the amount of compensation at £1350, but providing that this should not include costs, charges, and expenses which the owners might be entitled to recover under the company's Acts, but that such costs, charges, and expenses should be recoverable from the company in addition to the compensation as if the agreement had not been entered into. The company objected to pay the costs of ascertaining the amount of the compensation on the ground that the land had not been taken within the meaning of the 80th section of the *Lands Clauses Act*. They also objected to pay the costs of the preparation of the agreement:—

Held (affirming the decision of *Kay*, J.), that the land had been "taken" within the meaning of the 80th section, and that the company must pay the costs of ascertaining the amount of compensation and of the preparation of the agreement.

THE *Swindon, Marlborough, and Andover Railway Company*, under the powers of their Act passed in 1873, with which the *Lands Clauses Act* and *Railways Clauses Act* were incorporated, gave notice to the trustees of certain pieces of land in the parish of *Swindon* of their desire to purchase and take the land for the purpose of their railway. No agreement having been come to, and no award made or verdict given, the company, in October, 1875, entered upon the land under the powers of the 85th section of the *Lands Clauses Act*, having first deposited in the bank the sum of £3679 for the value of the land as determined by a surveyor, and having given the usual bond.

By the *Swindon, Marlborough, and Andover Railway Act*, 1879

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(42 & 43 Vict. c. xci.), the company were empowered to abandon certain portions of the works authorized by their former Act, and by the 9th section it was enacted that the abandonment of any portion of the railway or works should not prejudice or affect the right of the owner or occupier of any land to receive compensation for any damage occasioned by the entry on such land for the purpose of surveying and taking levels, or probing or boring to ascertain the nature of the soil, or setting out the line of the railway, and should not prejudice or affect the right of the owner or occupier of any land which might have been temporarily occupied by the company to receive compensation for such temporary occupation, or for any loss, damage, or injury which might have been sustained by such owner or occupier by reason thereof, or of the exercise as regards such land of any of the powers contained in the *Railways Clauses Consolidation Act*, 1845, or the *Swindon, Marlborough, and Andover Act*, 1873.

The 10th section was as follows:—

"Where before the passing of this Act any contract may have been entered into or notice given by the company for the purchasing of any land for the purposes of or in relation to any portions of the railway or works authorized to be abandoned by this Act, and which shall not be required for the purposes of any of the works by this Act authorized, the company shall be relieved from all liability to purchase or to complete the purchase of any such lands; but, notwithstanding, full compensation shall be made by the company to the owners and occupiers or other persons interested in such lands for injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice, and the amount and application of the compensation shall be determined in the manner provided by the *Lands Clauses Consolidation Act*, 1845, as amended by any subsequent Act, for determining the amount and application of compensation paid for lands taken under the provisions thereof."

The company, under the powers of this Act, abandoned the portion of the railway passing through the land included in the notice to treat, and gave back possession of it to the trustees of the estate.

The suit of *Charlton* v. *Rolleston* was instituted by the trustees for the purpose of carrying into effect the trusts of the settlement affecting the estate.

By a provisional agreement dated the 5th of December, 1882, and made between the trustees and some of the parties interested in the estate and the railway company, it was agreed (clause 1) that the amount of compensation payable by the company in respect of all loss, injury, and damage whatsoever sustained by the owners of the land included in the notice to treat by reason of the purchase of the said lands not being completed or of the entry of the company on the said lands, or of the user or occupation by the company of the said lands, or of the acts of the company in respect of the said lands by reason of the exercise of their statutory powers, should be the sum of £1350, provided that sum be not less than the sum which should be determined by a valuation made in manner thereinafter provided; and in case the sum of £1350 should be less than the sum so determined, then the amount of compensation payable by the company should be the sum determined by such valuation.

A valuation was afterwards made, but no alteration was made in the amount of compensation fixed by this agreement.

The 2nd clause was as follows:—

"The compensation mentioned in the last clause shall not extend to, or include, any costs, charges, or expenses which, under and by virtue of the company's Acts, 1873 and 1879, and the Acts therewith incorporated, the trustees may be entitled to receive or recover from the company, and the trustees shall be entitled to receive and recover such costs, charges, and expenses from the company in addition to such compensation in the same way and to the same extent as if this agreement had not been entered into."

This agreement was afterwards sanctioned by the Court on a summons taken out for that purpose, and the sum of £1350 was transferred into Court in the suit and in the matter of the *Lands Clauses Act*.

A petition was afterwards presented in the suit and in the matter of the *Swindon, Marlborough, and Andover Railway Acts*

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and the *Lands Clauses Acts* by the owners of the land, asking for the reinvestment of the sum of £1350 part of the sum in Court, and that the company might pay the costs of and incident to the taking of the land, and of and incident to the said provisional agreement and the application.

The petition came on to be heard before Mr. Justice *Kay* on the 30th of June, 1883.

Robinson, Q.C., *J. Henderson*, and *Ryland* appeared for the Petitioners.

Upjohn, for the company.

KAY, J.:—

The *Swindon, Marlborough, and Andover Railway Company*, under sect. 18 of the *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), gave notice to treat for certain lands, and under sect. 85 they entered into possession, deposited a sum of money in the bank, and also gave a bond. The company did not complete the purchase, but voluntarily abandoned the lands, and under the provisions of the special Act, which enabled the company to do that, the vendor is entitled to compensation for the wrong or damage done to the lands by altering the condition in which they were. There was an action pending for the administration of the trusts of a settlement of this estate. The amount of compensation might have been determined under the *Lands Clauses Consolidation Act* by an arbitrator, but that was not done, as the parties came to an arrangement as to the compensation and as to the costs; but the agreement was to be subject to the approval of the Judge who might try the action. The Court approved of the agreement, and the compensation money was paid into Court in the action and in the matter of the *Lands Clauses Consolidation Act*. The railway company object to pay the costs of those proceedings, and whether the Act authorizes me or not to deal with them, I think the general order does, as all these were proceedings in Court, and were necessary, and I hold that I have power to order the company to pay those costs, and accordingly I do order them to pay them. The main contention is as to the costs

of the agreement to ascertain the amount of compensation. There have been less costs than would have been incurred under the provisions of the Act if the proceedings had been before an arbitrator or a jury. The Act requires that in all cases there shall be a deposit made at some bank, and the money which I have to deal with has been deposited under the special Act which incorporates the *Lands Clauses Consolidation Act* in express terms; and it seems to me that this proceeding comes within the 80th section of the Act, which enacts that "it shall be lawful for the Court of Chancery in *England* . . . to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof . . . and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants." The question is, are the costs of ascertaining the amount of compensation "costs" strictly within the meaning of "the costs of the purchase or taking of the lands or which shall have been incurred in consequence thereof," and I think that they are. If I had any doubt it would be removed by this, that they would be costs under the 85th section—costs incurred by the landowner—and all these costs the Court is in the habit of ordering the company to pay under the 80th section. I do not think that I ought to favour an opposition of this kind, but that I am bound to make the company pay the costs if I can do so; for the reason that the company has been dealt with in a more merciful way than if there had been the usual formal proceedings, the costs of which they must have paid. I think that the costs of the agreement are proper costs, charges, and expenses under the 80th section, not for the purchase of, but for taking possession of the lands, and afterwards throwing them back upon the vendor's hands. The order will be for payment, and the amount will be left to the Taxing Master.

T. F. M.

The order as drawn up directed the company to pay (1) the costs and all reasonable charges and expenses incident thereto of the taking of the lands in the petition mentioned; or (2) which

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had been incurred in consequence thereof other than such costs as were by the *Lands Clauses Act* otherwise provided for; (3) the costs of the petition and summons and adjournment into Court; (4) the costs of the preparation of the agreement; (5) the costs of ascertaining the amount of compensation therein referred to; (6) the costs of obtaining the order and of all proceedings relating thereto, except such costs as were occasioned by litigation between adverse claimants, and of a motion to vary the minutes, such costs, charges, and expenses to be settled by the Taxing Master.

C. A.

From this order the company appealed, but the argument was confined to the 1st, 2nd, 4th, and 5th items. The appeal came on for hearing on the 30th of October, 1884.

Upjohn, for the Appellants :—

The costs to which we object are the costs which are described as the costs of taking and in consequence of taking the land; the costs of the preparation of the agreement and the costs of estimating the compensation. These costs cannot be recovered in this action: *Fisher* v. *Fisher* (1); *Ex parte Buck* (2). All these costs are excluded by the agreement, and the Respondents are only entitled to such costs as they would have been entitled to if there had been no agreement. The *Abandonment Act*, 42 & 43 Vict. c. xci., fixes them down to such compensation as could be obtained under the *Lands Clauses Act* for lands taken under the provisions thereof. The Respondents claim the costs under the 80th section of the *Lands Clauses Act;* but we contend that the 80th section is not applicable to this case. The land has not been "purchased or taken" within the meaning of that section.

[BAGGALLAY, L.J. :—The only effect of your establishing that we have no jurisdiction to give costs under that section would be that the landowner would have to proceed under the 68th section and have them settled as compensation before an arbitrator or a jury. That would only cause unnecessary expense to the company.]

If we were to go before an arbitrator or a jury under the 68th

(1) Law Rep. 17 Eq. 340. (2) 1 H. & M. 519.

section we think we have a good defence. We therefore press for the opinion of the Court upon the question now before it, which is practically whether there has been any "taking" under the *Lands Clauses Act*. Proceedings under the 85th section are never called "taking lands" in the Act, the words used are always "entering upon and using." There have been several decisions on the meaning of the word "take" as used in the Act, and they are all in our favour: *Spencer* v. *Metropolitan Board of Works* (1); *Cobb* v. *Mid-Wales Railway Company* (2); *Metropolitan District Railway Company* v. *Sharpe* (3); *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (4); *Tiverton and North Devon Railway Company* v. *Loosemore* (5). In *Ex parte Flower* (6), and *Ex parte Morris* (7), although the land had been originally entered upon under the 85th section the purchase had been completed. But here the undertaking has been abandoned.

With respect to the costs of preparing the agreement, the Respondents cannot be entitled to them under the words of the contract, for if there had been no agreement there would have been no costs of preparing it.

W. Pearson, Q.C., and *Ryland*, for the Respondents, referred to *Ex parte Flower; Ex parte Morris; Adams* v. *London and Blackwall Railway Company* (8); *Burkinshaw* v. *Birmingham and Oxford Junction Railway Company* (9); *Reg.* v. *Stone* (10); *Barker* v. *Metropolitan Railway Company* (11). They were stopped by the Court.

E. Beaumont, for an infant entitled to the land in remainder.

1884. Nov. 10. BAGGALLAY, L.J.:—

It was out of deference to the able argument of Mr. *Upjohn* that we postponed giving judgment in this case at the conclusion of his address, particularly having regard to the reference he

(1) 22 Ch. D. 142.
(2) Law Rep. 1 Q. B. 342.
(3) 5 App. Cas. 425.
(4) 9 App. Cas. 787.
(5) 9 App. Cas. 480.
(6) Law Rep. 1 Ch. 599.
(7) Ibid. 12 Eq. 418.
(8) 2 Mac. & G. 118.
(9) 5 Ex. 475.
(10) Law Rep. 1 Q. B. 529.
(11) 17 C. B. (N.S.) 785.

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made to two cases decided in the House of Lords, to which I will advert presently.

The appeal in this case is presented under the following circumstances. The *Swindon, Marlborough, and Andover Railway Company* obtained their Act in the year 1873. They gave notice to treat to the owner of the particular land with which we have to deal in December, 1874, and in the month of October, 1875, the purchase-money not having been paid, they deposited under sect. 85 of the *Lands Clauses Consolidation Act* £3679 in Court, and gave a bond for a like amount pursuant to the terms of that section, and having so paid the amount into Court and given the bond they entered upon the land in October, 1875, and proceeded with the works necessary for the construction of the railway. I do not gather from the Act of Parliament which has been before us, and which was passed in the year 1879, that the railway itself was abandoned, but that particular portions of the railway were abandoned and a fresh line adopted, and that that involved the abandonment of the purchase of the land which had been taken and with which we have to deal on the present occasion. The *Abandonment Act* contained these provisions. The material sections are 9 and 10. [His Lordship read these sections and continued:—]

Now in that state of the case there appears to have been an agreement come to with the trustees of the estate, who were the landowners. Possession of the land had been given up to the trustees previous to the agreement to which I am about to refer, and which is dated the 5th of December, 1882. That agreement referred to the various steps taken as regards the original notice to treat—the payment of money under sect. 85, which had accumulated in the interval, and amounted to upwards of £4000, and the passing of the *Abandonment Act*, and then it went on to provide that the amount of the compensation payable by the company for or in respect of all loss, injury, and damage whatever, sustained, or which might be sustained, by the owners by reason of the purchase of the said lands not being completed pursuant to the said notice, or of the entry of the company upon the said lands, or of the user or occupation by the company of the said lands, or of the acts of the company done upon or in respect of

the said lands under their statutory powers, should be the sum of £1350. That sum of £1350 was made subject to a valuation by surveyors, the subject-matter of the notice to treat being also matter of a suit in equity, and therefore they provided for that sum being increased by any fresh valuation to be made, but it does not seem to have been altered or departed from. It will be observed that the provision is confined to the amount of compensation payable for loss, injury, or damage sustained. Then the 2nd paragraph of the agreement was in these terms: "The compensation mentioned in the last clause does not and shall not extend to or include any costs, charges, or expenses which, under or by virtue of the company's Acts of 1873 and 1879 hereinbefore recited, and the Acts therein incorporated, the trustees may be entitled to receive or recover from the company, and the trustees shall be entitled to receive and recover such costs, charges, and expenses from the company, in addition to such compensation, in the same way and to the same extent as if this agreement had not been entered into." We had some discussion at the close of the argument as to the effect of those latter words, and it has been suggested that, inasmuch as if the agreement had not been entered into there could have been no costs of the agreement, therefore those costs ought to be excluded. I do not take that view of the case at all. I take it that all it means is this, that you are to have the costs in the same way as if you had not come to any agreement as to compensation for loss or damage.

The real difficulty in the case arises in this way. The £1350 was paid into the Court of Chancery in the suit of *Charlton* v. *Rolleston*, which was a suit for the administration of the trusts of the settlement, and an application was made for the appropriation of that money, and the petition was intituled not only in the first suit but in the matter of the Act of Parliament, and an application was made for costs very much in the same way as an application would be made for costs in the case of the *Lands Clauses Act* where the purchase-money has been paid into Court, and where an application is made to take it out. The question turns upon the provisions of sect. 80 of the *Lands Clauses Act*. The section refers to moneys which had been deposited and remained deposited in the bank, and in some way or other the

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amount of the purchase-money had been agreed on or ascertained by arbitration or by a Judge. Then the words of this section will be observed: "In all cases of moneys deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith." As I read these introductory words they would clearly embrace the case of moneys deposited under sect. 85, and this would apply to the case of agreed moneys deposited. After certain exceptions, which I need not refer to in detail, it goes on to say: "It shall be lawful for the Court of Chancery in *England*, or the Court of Exchequer in *Ireland*, to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for." And then it goes on enumerating a series of costs, charges, and expenses which are to be provided for. Upon the application to Mr. Justice *Kay* he was of opinion that the parties applying were entitled to have the same costs, charges, and expenses as if it had been an application with reference to purchase-money paid in under sect. 85. It has been alleged that that was an erroneous view, and for this reason, that although sect. 80 would be applicable to cases of payment in under sect. 85, yet some of the costs which were so asked for as being governed by the same general rule were not costs of the "purchase or taking" of land; in other words, that this land in respect of which the money had been paid was not "taken," and therefore the provision of sect. 80 would not apply. Mr. *Upjohn*, as I have already said, addressed to us a very learned and able argument on the point with reference to the true effect of sect. 85. His argument was substantially this, that as regards the lands entered upon by the company, and in respect of which they paid money under sect. 85, they had not either been taken or purchased, and, therefore, the Court had no jurisdiction to give the costs which were asked and which were given by Mr. Justice *Kay*. In support of his contention he referred to two cases in the House of Lords; but having carefully considered those cases, I am confirmed in the view which I formed at the conclusion of the argument. The

first is *Tiverton and North Devon Railway Company* v. *Loosemore* (1). In that case there had been a limit of three years for the exercise of the powers of compulsory purchase of the lands and five years for the completion of the works of the railway, and if the works so authorized to be made were not completed in the time specified, the power for making and completing the same were to cease. Notice to treat for the purchase of those lands was given a very few days only before the three years expired, and having given the notice to treat the company kept quiet and took no step until about thirteen days before the expiration of the five years for completion, and then, to the disgust of the proprietor Mr. *Loosemore*, they obtained a valuation of the land and paid the money into Court under the 85th section. As far as I can make out, all that was decided in that case was that there was no compulsory power to take under sect. 85. The parts which appear to me the most material are in the judgments of Lord *Cairns* and Lord *Watson*. At page 492 of the report Lord *Cairns* gives this as the ground of his decision. "The power to the company to enter and use appears to me to be equivalent to a power to convert to their own use, and this is completed as soon as the company enter on and appropriate the land." That was a question as to whether, having complied with the terms of the Act of Parliament thirteen days before the five years expired, they might or might not go on after the thirteen days had expired to complete the works. But the principle, which appears to me to substantiate the view which I have taken of this case, is stated at pages 488, 489. Lord *Cairns* says: "The statute appears to me to place the company and the respondent by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequences of that possession after the expiration of the five years may be." I think in enunciating the effect of the notice to treat, and of what took place subse-

(1) 9 App. Cas. 480.

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quently, Lord *Cairns* stated that which has been the recognised view for many years of Courts of Equity of the effect of a notice to treat. It is an analogous position to that of vendor and purchaser, leaving the price to be apportioned if the parties cannot agree, and either party to have power to enforce it. Then Lord *Cairns* says on the same page: "The company, before the expiration of the five years, took possession of the land, changed the whole character and formation of the ground, adapted it to their own purpose, and destroyed its suitability for its former use." That is the case we have got here. Then he says, at page 491: "In my opinion, where there has been a notice to treat, and where, before the price has been ascertained, the company has, under the statute, regularly obtained possession of the land, and proceeded to use it for making a railway, nothing more remaining to be done but the ascertainment of the price, the transaction is one that must go forward and not backward; the landowner has a continuing right under the statute to have the price fixed and paid, and that right he must pursue." I think we have got the principle applicable to a case of this kind recognised in the judgment of Lord *Cairns*. Mr. *Upjohn* referred to certain passages in the judgment of Lord *Blackburn*, but Lord *Blackburn* can hardly be considered as having arrived at the same conclusion as the other members of the House who gave judgment in the case. Lord *Watson* gave his decision in that case, and some passages in his judgment are quite as clear and precise as in Lord *Cairns'* judgment, and perhaps it may be said that they carry a greater amount of weight as far as he is concerned, because originally he had taken the other view, having eventually come round to the view he finally adopted. It appears to me that that case affirms this proposition. You have got the relative position of vendor and purchaser established by the notice to treat. It may be worked out in one of two ways. It may be worked out either by actual agreement between them, or by an arbitration, or by giving permission to the railway company to enter before the settlement of the amount has been come to, and their paying the amount into Court under the 85th section. In my opinion, it is equally a taking in each of these cases. The landowner is deprived during the notice to treat of the power of exercising any control over his

land. What is the effect then of an abandonment? It is simply this, that although you have taken the land you may give it up, and instead of paying the full price which you would have had to pay if you had retained it for the purposes of your railway, you shall pay for that limited use which you have acquired over it, and by means of which you have made your railway.

Then there is the other case to which Mr. *Upjohn* referred us, namely, *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (1). I have great difficulty in seeing what possible bearing that has on the case with which we are now dealing. No doubt, one or two passages in the judgment were referred to by Mr. *Upjohn*, but the case itself, if we look at the circumstances, appears to have no bearing upon the present. In that case the *Swindon and Cheltenham Railway Company* obtained power to carry their railway across the *Great Western Railway*. They were to cross it at one part by going over it, and they were to cross it at another part by going under it; but in no case were they to acquire the land. The land was to remain the property of the *Great Western Railway Company*, and an easement only was granted to them to this extent—that they might enter upon it to construct the necessary works for their railway, but afterwards they were merely to have a right to use that portion which went over the railway and that portion which went under the railway, for the purposes of their traffic. Perhaps the substantial part of the matter was this, that the company had not got the full amount of their subscriptions paid as provided by the 16th section of the *Lands Clauses Act*, and the *Great Western Railway Company* attempted to obtain an injunction to restrain the *Swindon and Cheltenham Extension Company* from going on with the railway, because they had not got the full amount of their capital subscribed. It was there held, that there was nothing whatever in the circumstances of the case to bring them within the provisions of the 16th section of the *Lands Clauses Act*, which provides, "Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking the whole of the capital or estimated sum for defraying the expenses of the undertaking shall be subscribed under

(1) 9 App. Cas. 787.

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contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking." There had been an arbitration for settling the amount to be paid for the use of this easement, which was granted to the *Swindon and Cheltenham Company* by the *Great Western Railway Company*, and the amount was paid into Court under the 85th section. That again was not the compulsory taking of land. There was a difference of opinion, I think, between the learned Lords, who decided the case, as to the meaning of the words "taking of land." Lord *Bramwell* seems to have thought that the easement was land within the meaning of the Act, and Lord *FitzGerald* was of opinion that it was not, and came to the conclusion that what was to be done under the 85th section was not the exercise of compulsory powers; but both those learned Lords agreed in affirming the decision of the Court below, that the *Swindon Company* could not be restrained, Lord *Watson* taking a contrary view. It seems to me that in all these cases the compulsory purchase or taking of land arises when a notice to treat is given and when the relative position of vendor and purchaser is established.

For these reasons it appears to me that the conclusion at which Mr. Justice *Kay* arrived was quite right, and consequently this appeal must be dismissed.

I cannot part with this case without expressing my regret that the funds of railway companies should be wasted in appeals of this kind. It may be quite right to take the opinion of the Judge of first instance; and in this case I think that judgment was given in the most careful manner, and I entirely agree with the judgment in every respect; but I think in matters of this sort the decision of one Judge upon a point of this nature ought to be considered as final.

BOWEN, L.J.:—

I am of the same opinion.

What are the facts in this case? The company had, under

their special Act entered on and used certain lands. It then seemed good to them to abandon their undertaking, or a portion of it. An Act of Parliament was thereupon obtained providing that they might do so, compensating those persons whose lands they had used, and who otherwise would have been left out in the cold by the abandonment of the undertaking. That is to say, that those whose lands had been taken and used should be compensated for the company not going on to complete, and utilising it for the purpose of the undertaking. The land in this case belonged to trustees. The trustees were entitled to the benefit of this compensation clause. They were to have compensation for all injury or damage done to their estate by reason of the purchase not being completed. Now when would such compensation be ascertained and assessed? Either by agreement, or if not by agreement, by the machinery of the *Lands Clauses Consolidation Act*. What would such compensation include? It would include, first of all, what we may call non-legal charges. The compensation which either a jury or a business man could very well ascertain and assess in respect of the damage done by the occupation of the property by the railway company, or by the paralysis of the property during the period, but there would also be another class of "damage," which would consist of what one might call strictly legal charges and expenses, which could easily be ascertained by the legal tribunal of the Court, namely, the Taxing Master. Both those elements of compensation were, in the first instance, left to be ascertained by the machinery of the *Lands Clauses Act*. The parties put their heads together, and they make an agreement of the most reasonable kind, by which these two kinds of compensation are dealt with specifically. First of all, the sum of £1350, subject to a certain abatement, or possible abatement, which we need not discuss at the moment, was to be paid by the company; but the compensation so paid in respect of the general damage was not to include the legal charges proper, which were to be left outside the agreement, and, in my opinion, with one object only, namely, that the parties thought they could be dealt with more expeditiously by a tribunal accustomed to deal with such things, namely, costs. Courts of law can ascertain and measure costs with a precision and with

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a justice which of course an arbitrator cannot do. That is very obvious. I also wish to point out that it seems to me that the persons who drew that agreement especially thought that the costs would be ascertained by sect. 80 of the *Lands Clauses Consolidation Act*. They thought, rightly or wrongly (and they may have been wrong) that the costs would be ascertained in that way, and mark! it was all for the benefit of the company, and for the company only, that legal expenses should not be inquired into by a lay arbitrator or a jury, but should be dealt with specifically and directly by the Court itself. Every one who knows anything about business at all, knows well enough that the Taxing Master is the protector of the person who has to pay costs, and if you leave it to a jury they deal with the matter much more roughly than a Taxing Master would. Therefore, I repeat that the arrangement was for the benefit of the company. What do the company do? As soon as these costs are to be taxed, they turn round and take the point that the Court is not the proper tribunal to tax its own costs, and that it should be done by arbitration under the *Lands Clauses Act*. What a wretched point! It is vexatious, because it compels the person who has to be compensated to wait for his compensation, and, to my mind, it is also frivolous, because the company insisting upon such a point are insisting upon having a tribunal which must be worse for the interests of their shareholders than if they allowed it to go before the Taxing Master, and yet this company has put forward this technical objection to the jurisdiction of the Court. It seems to me lamentable that a company should conduct its business in such a way; but still, if the point they have taken is a good one, no amount of regret on my part would prevent my dealing out to them strict law.

After considering the case as carefully as I have been able to do, and going over the facts, I have, although with considerable doubt and hesitation, come to the conclusion which has been expressed by Lord Justice *Baggallay*. I think that all these costs can be dealt with under sect. 80 of the Act, that the cases of moneys deposited under sect. 85 are cases of moneys deposited, alluded to, amongst others, in sect. 80; and that the land is sufficiently taken for the purpose of being dealt with under sect. 80

as land taken and used under sect. 85. I shall not go through the cases, because if I were to do so I should only elaborate my doubts and hesitation. The reasons given to me by Lord Justice *Baggallay* and Lord Justice *Fry* have induced me to agree with them.

FRY, L.J.:—

I am entirely of the same opinion. In every word which has been said by Lord Justice *Bowen* as to the character of this appeal I entirely concur. The question in this case is whether, under the 85th section, these costs can be ordered to be paid by the company. What are the introductory words of the 80th section? "In all cases of money deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required." Now it appears to me that we are bound to give those words the generality which they express, and to apply it to the cases of deposit of money not only under the section which relates to a compulsory taking of lands, but under the 84th and 85th sections of the Act, because these are cases of deposit of money in the bank under the provisions of this Act, and they are not within the limited exception referred to. The case therefore contemplated by the 80th section arises when money is deposited under the 85th section.

But then, in the event contemplated at the commencement of the 80th section, it is provided that it shall be lawful to the Court to do certain things, and amongst those things is the power to direct the payment of the costs of the purchase or taking of the land. It appears to me to be perfectly plain that the company acting under the 85th section is taking lands, and it is to be borne in mind that the word "taking" in the 80th section is used in contrast with "purchase," and it appears to me apt to describe the circumstances under which the company finds itself placed when it has exercised the powers of the 85th section.

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Is there any reason for not including the costs of the taking under the 85th section in the word "taking" in the 80th section? I can find none. On the contrary, I can see strong reasons in favour of so holding, and no better illustration of the reason for so holding can be given than the present case. Then it is said that where, under the 85th section, a company has given a bond, and the condition of that bond has been performed and the money deposited has been repaid, the vendor or the landowner has no lien whatever on that fund. That may be perfectly true, but it has nothing whatever to do with the question whether the Court, under the 80th section, has jurisdiction to order the costs of taking land under the 85th section to be paid. I agree with my learned Brothers, therefore, that this appeal must be dismissed with costs.

Solicitors for Appellants: *Moon & Gilks.*

Solicitors for Respondents: *Clarke, Woodcock, & Ryland; Munns & Longden.*

M. W.

Followed. SOLLE *v.* BUTCHER [1950] 1 K. B. 674

PAGET *v.* MARSHALL.

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1884
July 2, 3, 7.

[1884 P. 78.]

Lease—Mistake—Rectification.

Where there is mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral the remedy is not rectification but rescission, but the Court may give to a defendant the option of taking what the plaintiff meant to give in lieu of rescission.

Plaintiff wrote a letter offering to the Defendant to make a lease to him of a portion of a block of three houses, consisting of the first, second, third, and fourth floors of all three houses, at a rent of £500 a year. Defendant wrote in answer, accepting the offer; and a lease was executed whereby all the upper floors of the block were demised by the Plaintiff to the Defendant at the rent of £500.

Plaintiff alleged that the first floor of one of the houses was included in the offer, and in the lease, by mistake, and that he always intended to reserve such first floor for his own use. Defendant denied that he accepted the offer, or executed the lease, under any mistake.

The Court having found upon the evidence that a common mistake was not sufficiently proved, but that mistake on the part of the Plaintiff was, gave judgment for rescission with an option to the Defendant to accept rectification instead.

AFTER negotiation, and shortly before the date of the next-mentioned letter, an agreement was made between *Richard William Paget*, acting as agent for the Plaintiff, *Caroline Matilda Paget*, and the Defendant, *Wesley Marshall*, that the Plaintiff should make, and the Defendant should accept, a lease for twenty-one years from the 25th of December, 1883, at the yearly rent of £500, of certain portions of three warehouses, known as 48, 49, and 50, *Aldersgate Street*, in the city of *London*, namely, as the Plaintiff alleged, the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50.

On the 13th of November, 1883, the following letter was addressed by *R. G. Paget & Son*, a firm of marquee and tent manufacturers, of which the Plaintiff and her sons, *R. W. Paget* and *John Paget*, were members, to the Defendant, *Marshall*:—
"We will let you on lease for seven, fourteen, or twenty-one

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years, the upper part of Nos. 48, 49, and 50, *Aldersgate Street*, consisting of first, second, third, and fourth floors (reserving for our own use one of the closets on the second floor landing; also the right of passage to roof) for the sum of £500 per annum and taxes. We await your acceptance of the above terms."

On the following day, the 14th of November, 1883, the Defendant wrote in answer to *R. G. Paget & Son*, as follows:—"In reply to your memorandum of Nov. 13th, re premises Nos. 48, 49, and 50, *Aldersgate Street*, I accept your offer contained therein."

The Plaintiff alleged that "by inadvertence and contrary to the intention of the Plaintiff and her agent, and contrary to the true intent of the agreement," the first floor of No. 48, *Aldersgate Street* was included in the letter of the 13th, and that the Defendant knew that the same had been included by inadvertence when he wrote the answer of the 14th.

By a lease dated the 21st of December, 1883, and made between the Plaintiff of the one part, and the Defendant of the other part, the Plaintiff demised to the Defendant, "All those the first, second, third, and fourth floors of and in the messuages or warehouses and premises situate on the east side of *Aldersgate Street*, in the city of *London* . . . and known as Nos. 48, 49, and 50, *Aldersgate Street* aforesaid," for twenty-one years from the 25th of December, 1883, "except and reserved out of the said demise the lavatory between the first and second floors of the said premises and the sole right of passage to the roof" (which said lavatory and right of passage it was thereby declared were for the exclusive use of the Plaintiff) at the yearly rent of £500.

The action having been commenced on the 9th of January, 1884, the statement of claim (delivered the 28th of January, 1884) stated that the lease was prepared by the Plaintiff's solicitors without any instructions from the Plaintiff except the two letters above mentioned; that by inadvertence, and contrary to the intention of the Plaintiff, and to the true intent of the agreement, the first floor of No. 48 was included in the demise, and that the Defendant knowingly took advantage of the error. Also that the premises so by inadvertence included in the lease were separated from the rest by a closed partition; that the only

access thereto was through the premises occupied by the Plaintiff on the ground floor of the same building, and that by the terms of the Plaintiff's lease she was precluded from making any openings in the partition.

The claim was for a declaration that the lease ought not to have comprised more than the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50, *Aldersgate Street*, and that the Defendant might be ordered to elect between the annulment of the indenture and its rectification in accordance with the declaration; and that if he should refuse to consent to rectification, that the lease might be ordered to be cancelled.

The Defendant, by the statement of defence (delivered on the 25th of February, 1884) said that during the negotiation in 1883 the Defendant made an offer to the Plaintiff's agent, to the effect that the Defendant was willing to take a lease either of the first, second, third, and fourth floors of Nos. 48, 49, and 50, or of the second, third, and fourth floors of No. 48, and of the first, second, third, and fourth floors of Nos. 49 and 50, together with an additional room to be used as a packing-room. Defendant denied the verbal agreement stated in the statement of claim, and said that the first floor of No. 48 was intentionally included in the letter and not by inadvertence. He further said that the lease expressed the true agreement between the parties, and that it was executed by the Plaintiff with full knowledge that the first floor of No. 48 should be included therein, and without mistake, and not in pursuance of any agreement as alleged by the Plaintiff, or by inadvertence. He did not know and did not admit that the Plaintiff was precluded from making openings in the partition, and submitted that if she was so precluded she should obtain license to remove the partition. The Defendant submitted that there was no mistake, or if any that it was made by the Plaintiff only, and was not common to both parties; also, that if the lease were annulled or rectified, the Defendant could not be put in the same position as before.

The Defendant counter-claimed, if the lease should be annulled, compensation and damages; if it should be rectified, reduction of rent; and all proper accounts and inquiries.

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Issue was joined on the 5th of March, 1884.

At the hearing a model was used, in which the ground floor of No. 50, which was on the left of a spectator facing the houses, was coloured green; the ground floor of No. 49 was coloured yellow; the ground floor and first floor of No. 48 were coloured brown; and all the rest of the block was coloured blue. Thus the part coloured brown was that which the *Pagets* said they intended to retain for themselves, and the Defendant claimed the upper part of the brown in addition to the blue.

The ground floor of Nos. 50 and 49 was approached from *Aldersgate Street* only; the ground floor and first floor of No. 48 were by themselves; and the first floor of Nos. 50 and 49 were approached by a staircase from the street in the rear, called *Jewin Street.*

The evidence of the architect went to shew that the first floor of No. 48 (brown) was, from the first building of it in 1883, in accordance with the specification, along with the ground floor of No. 48, separated from the rest by a brick-nog partition, with timbers eighteen inches apart—the difference between a brick-nog and a brick-on-end partition being that the former is generally laid with bricks four-and-a-half inches wide, laid on that bed, the latter with bricks three inches wide. Doors might be made in the partition, or the partition itself might be removed without injury to the structure. Witness considered £500 a low rent for the blue part, on the assumption that the tenant paid half the rates and taxes, which rates and taxes on such a rental would be about £75. If the tenant paid the rates and taxes it would be a fair rent for the blue.

Sir J. Ellis, surveyor, deposed that £500 and rates and taxes was a moderate rent for the blue; and that a fair rent for the blue together with the first floor of No. 48, would be £700, the tenant paying rates and taxes. The rent of the first floor of No. 48, being a corner site, he should put at £250, the tenant paying rates and taxes.

The builders' foreman deposed that in October, 1883, when he was at work on the premises, the Defendant visited them. At that time the partition between the blue and the first floor of No. 48 was closed, and there was no passage from the blue to the brown.

He came into the blue part, and witness told him that the first floor of No. 48 was "taken off over Mr. *Paget's* shop, for Mr. *Paget's* own use."

The Plaintiff's son, Mr. *R. W. Paget*, deposed that in the latter end of October the Defendant called and was shewn over the blue part only. A few days afterwards Defendant, the witness, and his brother *John* were together on the ground floor and also in the basement under the brown portion; and the Defendant, who was in business as a furrier, inquired about a packing-room. In witness's presence Defendant did not go into the first floor, or say anything whatsoever about it. A few days afterwards Defendant called again. He asked if witness and his brother would allow him to place his name round the building over the cornice, and they objected, saying that if they allowed him to do so, "it would look as though he occupied the whole of this upper floor—instead of that it was ours." Defendant did not ask to have the first floor of the brown, nor say anything about it. Afterwards witness and his brother consented to Defendant having a tablet put up. Something was said about blinds, and witness gave an order to a blind manufacturer to supply nine blinds for the first floor, seventeen for the second, and seventeen for the third. This corresponded with the number of windows in the blue part. Witness was charged for the first floor blinds £7 10*s.*, for the second floor £13 2*s.* 6*d.*, and for the third floor £11 1*s.* 8*d*; and this tender he communicated to the Defendant.

Mr. *John Paget* deposed that the Defendant on one occasion spoke of the first floor of No. 48 as a "splendid floor," and said, "what a splendid floor it would make," but he never, when witness was with him, went into the floor, and never asked to have it. When Defendant made the remark, he and witness were on the second floor.

On behalf of the Defendant, Mr. *Farmer*, of the firm of *Debenham, Tewson, & Farmer*, auctioneers and surveyors, deposed that, in his opinion, £500 would be a fair rent for the first, second, third and fourth floors of the whole block, the tenant paying rates and taxes. If let in separate floors, £550 would be a fair rent. For the ground floor of No. 48, let separately, £380 a year would be a fair rent, and for all the ground floors, let together, £765.

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Mr. *Benjamin Norman*, another surveyor, agreed that £500 would be a fair rent for the whole of the upper portion, including the brown, and considered that a fair rent for the blue would be about £360.

The Defendant's evidence was that after looking at Nos. 49 and 50 he went with Mr. *Richard William Paget* up to the first floor of No. 48, and said, "With this floor it would make a fine warehouse. How much a year do you want for the lot?" meaning all the upper floors. He said, "Oh, we would not let it under a big rent; we would not let it under £600 a year. We intend using it ourselves." Witness noticed a thin partition, and that there was a mark of a doorway in it, which had been filled up. Witness said he would give £500 for it. Witness had made an alternative offer of £400 for the upper part of the building, exclusive of the first floor of No. 48, which Mr. *Paget* would not accept. Defendant then inquired for a packing-room. On a second occasion Defendant said he would give £450 a year for the first and other floors of Nos. 49 and 50, and the second, third, and fourth floors of No. 48, if Mr. *Paget* would find him a suitable packing-room, but that offer was not accepted. Afterwards the letters were written, as above stated. In cross-examination the Defendant admitted that he said nothing about the removal of the partition until after the lease was signed.

Hemming, Q.C., and *H. J. Hood*, for the Plaintiff:—

The form of relief prayed is in accordance with the decision of *Romilly*, M.R., in *Harris* v. *Pepperell* (1). That was a case of vendor and purchaser, but the same principle applies to lessor and lessee.

Marten, Q.C., and *Davenport*, for the Defendant:—

In *Harris* v. *Pepperell*, the Plaintiff's only authority, there was conduct on the part of the defendant which led to the error. That was not a unilateral mistake. The real ground of the decision was fraud, as Sir *G. Jessel*, M.R., who often discussed the case, several times pointed out, though Lord *Romilly*, M.R., out of delicate feeling, omitted to mention fraud in his judgment.

(1) Law Rep. 5 Eq. 1, 5.

"There can be no rectification if the mistake be not mutual or common to all parties to the instrument, or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without fraud, knew what the character of the deed was, and intended that it should be, the Court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bonâ fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement": *Kerr* on Fraud and Mistake (1). "In *Harris* v. *Pepperell* (2) Lord *Romilly*, M.R., said that the rule that the Court will not rectify an instrument on the ground of mistake, except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities, and does not seem sound. *Garrard* v. *Frankel* (3) and *Harris* v. *Pepperell* were, there is no reason to doubt, correctly determined; but the principle upon which they are to be upheld is that the Court in these cases merely abstained from setting the agreement aside on the consent of the defendant to submit to the variation alleged by the plaintiff. In cases of rectification, properly so called, the Court does not put it to the defendant to submit to the variation alleged by the plaintiff, but makes the instrument conformable to the intent of the parties without any such offer or submission:" *Kerr* on Fraud and Mistake (4). Neither on the ground of rectification, nor of cancellation, can the Plaintiff claim relief: *Sells* v. *Sells* (5); *Earl of Bradford* v. *Earl of Romney* (6).

The letter was an entirely independent offer. In *McKenzie* v. *Hesketh* (7) the defendant was not relieved from his mistake, and was compelled to have a reduction of rent. There the conveyance had not been executed; it was a case of specific performance only.

(1) 2nd Ed. p. 498.
(2) Law Rep. 5 Eq. 1.
(3) 30 Beav. 445.
(4) 2nd Ed. p. 499.
(5) 1 Dr. & Sm. 42.
(6) 30 Beav. 431.
(7) 7 Ch. D. 675.

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Hemming, in reply:—

It has been said that when a mistake has been proved on one side only, the Court will not grant relief. That is an inadequate and incorrect statement. The law is this—that if two persons contract, and they really agree to one thing, and set down in writing another thing, and afterwards execute a deed on that wrong footing, the Court will substitute the correct for the incorrect expression—in other words, will rectify the deed. Another class of cases is, where one of the parties only has made a mistake, and not the other. There the Court cannot rectify, because there is no contract in existence. The parties have never been at one, and there is nothing to rectify. The passage read from *Kerr* is consistent with this. All the Court can and will do, is to rescind the so-called agreement. In *Harris* v. *Pepperell* (1) itself, there was no rectification, but rescission. As to the supposed observations of Sir *G. Jessel*, it is unfortunate that none have been reported. The Court, however, in that case gave the defendant the option of taking what the plaintiff meant to give him, under the penalty of rescission if he refused the offer, and that is what we offer here. See the observations of the Hon. *Hedges E. Chatterton*, V.-C., in *Young* v. *Halahan* (2). The cases cited on the other side, together with *Webster* v. *Cecil* (3), also referred to in the passage from Mr. *Kerr's* book, are all founded upon the doctrine relating to mutual mistake, or common mistake. That is not this case. In *McKenzie* v. *Hesketh* (4) the Court satisfied itself that there actually was a valid contract concluded. In the present case there never was any such *consensus* as is needed to make a contract.

Marten, in reply, on *Webster* v. *Cecil*:—

In this case there was simply an offer, which was accepted. It was a case of specific performance, not of a deed executed.

BACON, V.C.:—

In all these cases on the law of mistake it is very difficult to apply a principle, because you have to rely upon the statements of parties interested, and upon not very accurate recollections of what took

(1) Law Rep. 5 Eq. 1.
(2) Ir. R. 9 Eq. 70, 78-81.
(3) 30 Beav. 62.
(4) 7 Ch. D. 675.

place between them. But the law I take to be as stated this morning by Mr. *Hemming*. If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the Court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities. The old law is very much as was stated in that very excellent treatise by Mr. *Kerr*, as to which anybody who has read it must be well satisfied with the diligence and industry, the intelligence and sagacity with which he has acquitted himself of his task, but which of course one cannot suppose is an authority upon which I can rely, although I listen to it with interest and respect.

The case before me is in a very narrow compass. The Plaintiff had taken the lease of a site from the *Goldsmiths' Company* upon a contract to build upon it a very valuable and commodious structure. He did so, and his plans are in evidence; it is quite clear what his intention was. He built two separate ground-floor tenements, Nos. 49 and 50, to be let to two separate tenants. He kept a third, No. 48, including ground and first floors, intending to occupy it himself, and the fourth part, that coloured blue on the model, he had to let when the negotiation commenced with the Defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things—as separate as if they had been in some other street—and the third, No. 48, was equally separate and distinct—built by the Plaintiff for his own occupation, and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. To that end he built on the ground floor of No. 48 a staircase communicating with the first floor of No. 48, and he partitioned off the first floor of No. 48, so that in its turn it became just as distinct a building—just as

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distinct a tenement—as Nos. 49 and 50, and the purpose was distinct. Then, the part coloured blue (which included the whole first floor of the block except that of No. 48, and all the upper floors without any exception) being still available, and the Plaintiff willing to let it, he constructed a staircase which led from the street past the first floor of No. 48, and landed upon the blue part, I will call it, that is sufficient description,—no communication whatever either in fact being made, or according to the evidence ever intended to be made, between the ground or first floor of No. 48 and the part coloured blue. That was the state of things when these parties met to negotiate. The partition which effectually severed the first floor of No. 48 from the part coloured blue, had been completely settled and arranged. The Defendant on his first visit looked over all that was then to let, ascertained what the Plaintiff meant to let, saw the first floor over No. 48, said that it would make a very handsome warehouse, but knew at the same time that it was not to be let, because, to use his own expression in his own evidence, the Plaintiff told him "we mean to use that for ourselves." That is the evidence which the Defendant has given on this occasion. He says that he was satisfied to some extent with what he looked at, and desired to acquire it, but he must have a packing-room. He could not mean the first floor, that which he said was a magnificent warehouse could not be a packing-room, it could not in the nature of things; and he does not say that that was in his mind, still he insists more than once on the necessity of having a packing-room. I am mentioning these facts in order to ascertain, as it is my duty to do, what I must take to be proved to have been the intention of the parties when they entered into the negotiation. He asks for a packing-room. The brother goes with him down into a cellar—a cellar under No. 48, in the basement of No. 48—they look about there, and the brother comes in and says, "You cannot have it." No wonder, because there can be no access to it but from the floor of No. 48, and that went off.

Now, it would be impossible for me to connect, and there was a very faint attempt made to connect, the necessity which was present in the Defendant's mind to have a packing-room, with the magnificent first floor, which he now says he had in his mind

when he was present. The statement about putting up the inscription by no means encourages any such notion. The Defendant desired to advertise to the public by means of a large inscription on the front of that which was to be his the trade which he was carrying on. He wished also to have a similar inscription over No. 48. That was resisted. It was the subject of discussion between them; the reason it was resisted was explained to him: "If we granted you that, it would look as if you were carrying on your business in our warehouse;" but they said that, in order to accommodate him they would be willing to insert a tablet, containing his name and business, provided it did not interfere with the architectural decorations of No. 48. These facts are beyond all question. Both parties are agreed. Then the Plaintiff writes a letter in which he offers to let, among other things, the first floor of No. 48. This is answered very readily by the Defendant, who accepts the offer. Instructions are sent to the solicitors, instructions consisting only of this letter. Mr. *Marten* made a point that the Plaintiff, in his pleadings, said they had no other instructions. They must have had some other instructions. I should read the word "other" used by him in the pleadings as meaning no different instructions, no variation in form or otherwise from the words that appear in the letter. Then the lease is prepared and executed in accordance with the letter, including the first floor of No 48.

Under these circumstances, the facts being as I have stated, am I, because the lease has been executed under seal, demising to the Defendant that which the Plaintiff never meant to let him have, that which the Defendant says he knew at one time the Plaintiff intended to keep for himself, that which he has never claimed at any period prior to the letter—am I to say that the agreement is to be held to be irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. On the evidence, it looks very like a common mistake. The Defendant, it is true, says in his defence, that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of the 13th of November, 1883. Certainly he never said so until it is said in the defence, which I am looking at now;

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but he has not said so in his evidence. He has never said that he intended to take that. The argument addressed to me has been this :—"The separation of No. 48 and the blue, is effected solely by means of a brick-on-end partition; and that is easily removed." People building brick-on-end partitions do not mean them to be easily removed, unless there is some purpose to remove them, and here, using the Defendant's own evidence on this occasion, at that time the partition was effectually finished, and the Defendant knew that the Plaintiff intended to reserve it for his own use in his own business. The law being such as I have said, it is not necessary to say anything about how easily you can make holes in a partition, and how you can knock down a partition; you can pull down the front of a house with equal ease if you have proper appliances and proper workmen to do it. The way it is forced on my attention is the reason why the partition was first made, why it was found to be in existence when the Defendant first inspected it, why he knew from that time as well as he knows now that it never was the intention of the Plaintiff that he should have that "magnificent" room which formed one of two rooms which constituted the business place intended by the Plaintiff for his own use, and to which the access was made by one staircase communicating with nothing but the upper room.

But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—that is, such a common mistake as would induce the Court to strike out of a marriage settlement a provision or limitation—that there was to some extent a common mistake I must in charity and justice to the Defendant believe, because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the letter was right; but if there was not a common mistake it is plain and palpable that the Plaintiff was mistaken, and that he had no intention of letting his own shop, which he had built and carefully constructed for his own purposes.

Upon that ground, therefore, I must say that the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the Defendant should have an opportunity of choosing whether he will submit, as the

Plaintiff asks that he should submit, to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the Court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the Defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. Then we shall have to settle the terms on which it should be annulled. The Plaintiff does not object, if the agreement is annulled, to pay the Defendant any reasonable expenses to which he may have been put by reason of the Plaintiff's mistake; but it must be limited to that. I should like, if it be convenient for counsel or for the parties, to have an answer to the proposition I have made, in order that that may be fully before the persons whom it interests. I may say that I can find no reason for a reduction of the rent. I listened attentively to what Sir *John Ellis* said, and to what Mr. *Farmer* said, and I cannot but think that the rent of £500, if the lease is rectified, ought not, with any show of justice, to suffer any reduction.

Marten, for the Defendant, agreed to strike out the first floor of No. 48 from the lease; the lease in other respects standing as it was executed.

BACON, V.C.:—

Then the decree will be, the Defendant electing to have rectification instead of cancellation of the lease, let the lease be rectified by omitting from it all mention of the first floor of No. 48. Then as to the costs of the action, the Plaintiff is not entitled to costs, because he has made a mistake, and the Defendant ought not to have any costs, because his opposition to the Plaintiff's demand has been unreasonable, unjust, and unlawful.

Solicitors: *Prideaux & Sons*; *Phelps, Sidgwick, & Biddle.*

J. B. D.

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July 29;
Aug. 1.

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[1883. F. 1175.]

Trustee, and Cestui que Trust—Improvident Investment—Mortgage on House Property—Employment of Agents—Valuation by Mortgagor's Surveyor—Selection of Valuer—Negligence—Liability of Trustees.

The rule that trustees, acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business.

Trustees empowered to invest on mortgage lent under the advice of their solicitors a sum of £5000 upon mortgage of a freehold house and grounds at *Liverpool*, valued to them at from £7000 to £8000. The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors that a *London* surveyor who had introduced the security to them, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage, should value the property for the trustees, and they acted upon the report of this valuer, which was of an inflated character.

The mortgagor afterwards became bankrupt, and the property would not realize the sum advanced:—

Held, that the trustees were jointly and severally liable to replace the sum advanced, with interest at 4 per cent. from the date of the loan.

IN the month of August, 1875, the sum of £5439 9*s.* 2*d.* New £3 per cent. Annuities, was standing in the names of the Defendants, *A. J. Tapson*, and *W. H. Benyon-Windsor*, as the English trustees of the will of *John Dunn*, of *Tasmania*, deceased. By his will Mr. *Dunn* had directed his trustees to stand possessed of his daughters' shares in the proceeds of the sale and conversion of his real and personal estate upon trust to invest each such share in the names of the said trustees, or of such persons as they should appoint for the purpose, in or upon first mortgages of real estate in *Tasmania*, or in *Great Britain*, or in or upon the public stocks or funds of the *United Kingdom*, and during the life of each of his daughters to pay the interest of her share to her for her separate use without power of anticipation, and after her death to hold her share upon trust for her children and remoter issue as she should appoint.

Catherine, one of the daughters of Mr. *Dunn*, and the widow of the Rev. *H. P. Fry*, was resident in *England*, and under powers in that behalf in the will of the testatrix contained, Messrs. *Tapson* and *Benyon-Windsor* had been appointed trustees of such portion of Mrs. *Fry's* share as might be remitted to them; and the said sum of £5439 9*s.* 2*d.* New 3 per Cents. arose from the investment by them of a sum of £5000 which had been so remitted.

Of the two trustees, Mr. *Benyon-Windsor* took the more active part in the administration of the trust, and his solicitors, Messrs. *Roy & Cartwright* (who were then also the solicitors of Mrs. *Fry*), acted as the solicitors of the trustees.

Mrs. *Fry* had four children, and was desirous of having the trust fund invested so as to produce a higher rate of income, and had communicated her desire to Messrs. *Roy & Cartwright*. In August, 1875, a Mr. *Paterson Kerr*, who carried on business as a surveyor, land agent, and auctioneer, in *Moorgate Street, London*, under the firm of Messrs. *Paterson Kerr & Goldring*, offered Messrs. *Roy & Cartwright*, as a security for a loan of £5000 on mortgage, a freehold house and grounds near *Liverpool*, with the particulars of which he supplied them.

Messrs. *Roy & Cartwright* thereupon communicated this offer by letter to each of the trustees; and their letter to Mr. *Tapson*, which was dated August 19, 1875, was as follows:—

"Enclosed we send you a short extract from a letter containing particulars of a security for £5000, with interest at 4½ per cent., which we think will suit Mrs. *Fry's* trustees. We have sent Mr. *Benyon-Windsor* a copy of these particulars, and he desires us to tell you that he approves of the security subject to our being satisfied as to the title and value. On the first point (title) we of course shall carefully examine the deeds in the usual way, and on the second point (value) we shall have an auctioneer's valuation. We endeavoured to get 5 per cent. for the loan, but without success, and we should probably have lost the security had we insisted on the higher rate. However, the security appears to be a perfectly good one, and Mrs. *Fry's* income will be materially improved by the transaction, and we may further notice that good mortgage securities are extremely rare at present. Be good enough to inform us if you approve of the security, subject to

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the questions on title and value being properly investigated. At present we know nothing more of the borrower or the security than what appears in the enclosed extract."

Enclosed in each of the letters was the following extract from Mr. *Paterson Kerr's* communication: "£5000 at 4½ per cent. The security offered for this advance is a freehold house and grounds situate in *Grove Park, Liverpool*, which cost the present proprietor between £8000 and £10,000 a few years ago. He has, in consequence of his *London* partner's ill health, permanently left *Liverpool*, and he has let the property for a short term of two years to a brother merchant at the nominal rental of £250 a year for the simple purpose of having it occupied. The tenant offered £350 a year to obtain a seven years' lease, but this our client would not agree to, as his intention is to sell it immediately trade in *Liverpool* has revived a little. We feel quite confident that this is a first-class security, and we should say that even if the borrower wished to mortgage up to the hilt, for he is, we might say, almost a millionaire. The reception rooms on the ground floor will sufficiently speak for the character of the house without giving you in the meantime further details. They consist of magnificent dining-rooms and morning-room, large library, spacious and splendidly-fitted billiard-rooms, very large and lofty hall, and most complete offices. This security we may as well assure you has been offered to no one else either here at *Liverpool* or elsewhere, and if you have a client desirous of investing this sum, we feel sure you cannot do better than advise him to take this security." To this letter Mr. *Tapson* replied on the 20th of August, that the description given of the proposed investment for £5000 was satisfactory so far as it went, except that if the money was only required for a short time it would be scarcely worth while to disturb the present investment, and he added: "Of course also the facts about the reasons for the house being let, as it is stated, below its value would require full investigation. I would rather that the decision about this matter should be left with Mr. *Benyon-Windsor*, I shall be content if he is." On the same day Messrs. *Roy & Cartwright* wrote to Mr. *Tapson* in reply as follows: "Your objection to the money being advanced for a short period is only a natural one, but we have arranged that the

borrower shall take the money for five years certain. We think that is as long as we can ask the mortgagor to bind himself to keep the money."

On or shortly after the 28th of August, 1875, Mr. *Paterson Kerr* was verbally instructed by Mr. *Cartwright*, one of the trustees' solicitors, to make a report as to the value of the property. There was no evidence as to whether he went down to *Liverpool* for the purpose or not, but on the 26th of August Messrs. *Roy & Cartwright* received his report, and sent it to Mr. *Benyon-Windsor*.

The report was as follows:—

"*Grove Park* is a private road containing about twenty houses, and is situated in the best part of *Liverpool*, close to *Princes Park* and *Sefton Park*, about forty minutes' walk and ten minutes' drive from the *Exchange*.

"This residence is one of the best, if not the best, in the park, and stands at the end of the road, thus rendering it quite private, commanding lovely views over *Sefton Park* and the *Toxteth Park* district. It is detached, of commanding and pleasing elevation, consisting of main building and two wings, with conservatory on either side, is approached by a carriage sweep having two entrances, and contains on the ground floor vestibule and large hall artificially heated, the vestibule paved with encaustic tiles, and the ceiling gilded, and the hall ornamented with marble pillars and handsome mirror, and opening into the reception rooms, which are all on the ground floor, and consist of noble dining room 34 feet by 20 feet fitted with valuable mantel and stove, and having the ceiling and walls panelled and decorated with hand-paintings, and the cornices of ceilings gilded and picked out in gold and colours. This room communicates with the library 24 feet by 14 feet, and both open into a beautiful domed conservatory 25 feet by 15 feet, an elegant drawing-room 22 feet by 18 feet, and a smaller drawing or morning room 20 feet by 15 feet, both communicating, and handsomely fitted and opening by French casements on to a lawn in front, and the larger room opening into a conservatory; a splendid billiard room 27 feet by 16 feet, opening into a smoking room, with lavatory, and hot and cold water laid on. Adjoining the dining-room, and communicating with it, is a butler's pantry, well fitted

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with every convenience, with a serving lift from the kitchen; and entirely shut off from the reception rooms is the following accommodation—water-closet and lavatory, with hot and cold water laid on, a large butler's pantry, with water and all convenience, and having an opening into the billiard room for the supply of refreshments; and in the basement, the entrance to which is shut off from the hall, are a large kitchen, completely fitted for the requirements of a family of distinction, housekeeper's store-room, splendid wine cellars, scullery, larder, coal cellars, boot and lumber rooms, &c.

"On the first floor, which is approached by principal and secondary staircases, are nine bedrooms, two dressing-rooms, two fitted bath-rooms, two water-closets, lavatories, linen room, and housemaid's closet, and a lady's boudoir.

"The principal bedroom is a handsome apartment, 24½ feet by 20 feet, and the boudoir is fitted with carved marble mantel, ceiling beautifully ornamented in gold and colours. On the second floor are two very large bedrooms for servants, and a lumber room; the principal staircase is lighted from the roof, and the first floor landing is lighted by coloured glass dome. In the rear of the house is a small pleasure garden, arranged in terrace and lawns, and in the rear of the pleasure garden is a range of recently erected glasshouses arranged in five divisions, the centre one being a conservatory, with a vinery on either side of it, and two store houses beyond the vineries, all fitted up upon the most approved principle and regardless of cost. In the front of the residence a large lawn, with flower parterres, and ornamental fountain, and well clothed with shrubs and timber. This part of the property has a frontage of about 121½ feet to *Grove Park* by a depth of about 187 feet and a width at the back of about 74½; on the other side of the park is a piece of land having a frontage of about 131½ feet by a depth of about 220 feet, part of which is arranged as an ornamental ground, with croquet lawn, and part is kitchen garden, profusely stocked with standard wall and *espalier* fruit trees; there are also first-class outbuildings, inclosed in carriage yard, and comprising large coach-house for four carriages, heated by hot-water pipes, harness-room with mahogany fittings, a three-stall stable, and a large loose box, fitted with patent iron

mangers and racks, and thoroughly well drained and fitted with patent ventilating shafts, large loft over, and three rooms for coachman, with a pantry, sink and water laid on, and other conveniences.

"A property of this kind, and in this district of *Liverpool*, is always certain to command a tenant from among the numerous wealthy merchants of that town. Mr. *Campbell* fitted it up, added to it, and improved it, with a view of its being his permanent residence, but in consequence of the ill-health of his *London* partner he was compelled to relinquish the conduct of his *Liverpool* business and take up his residence in *London*. We are of opinion that it is worth a rental of £350 per annum, and we are given to understand that this could have been obtained for it if Mr. *Campbell* had chosen to grant a lease for seven years to a tenant, but this he declined to do; he has now accepted the nominal rent of £250 per annum for a tenancy of two years, thinking that at the end of that period, and with a revival of the normal state of trade in *Liverpool*, he will be able to get a higher rental on lease than he could now obtain, or sell at its fair value. Taking all the circumstances affecting this property into consideration, we are of opinion that its fair market value is from £7000 to £8000. This opinion we have formed after mature consideration, in the face of the fact that the property has cost the present owner between £9000 and £10,000. We believe the money has been quite judiciously spent, but the present position of the trade of *Liverpool* is such that few, if any, of the merchants of the town care to lock up capital in landed property or houses, and therefore we do not think if this residence were forced into the market at the present time it would realise more than the value which we have put upon it. We understand that there is a rent-charge of £16 11*s.*, payable by this property as its annual contribution towards the maintenance of *Princes Park, Liverpool*."

It appeared from the evidence produced at the hearing of the action that the solicitors of the trustees paid Mr. *Kerr* £75 for his charges, that the ordinary fee at *Liverpool* for such a report would have been about ten guineas, that the £75 was in the nature of Mr. *Kerr's* commission for obtaining the loan, and that it was afterwards repaid by the mortgagor.

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The report was returned a day or two afterwards by Mr. *Benyon-Windsor* to Messrs. *Roy & Cartwright* with a letter to the effect that as the report read all right the matter had better be followed up. Messrs. *Roy & Cartwright* accordingly investigated and approved the title and prepared the mortgage deed. On the 24th of September, 1875, Mr. *Benyon-Windsor* wrote to his co-trustee Mr. *Tapson* as follows:—

"After much looking about Messrs. *Roy & Cartwright* have succeeded in obtaining a mortgage for Mrs. *Fry's* money to the material augmentation of that lady's income. I believe you know the particulars, but I trouble you with a line to mention that I quite approve of the matter, and that I think the affair 'all right' in every particular."

The transaction was completed on the 28th of September, 1875, when the trustees advanced the sum of £5000 (which they had raised by a sale of the New Three per Cents standing in their names) to Mr. *George Campbell* at 4½ per cent. interest, and he executed a mortgage in fee to them of the house and grounds described in the report by an indenture, which was dated the 28th of September, 1875, and which contained a proviso that upon punctual payment of the interest the principal money should not be called in for the period of five years.

The interest on the mortgage was regularly paid during five years from the date of the security. Mr. *George Campbell*, the mortgagor, was however made bankrupt some time before May, 1879, and subsequently the payments became irregular, the property fell vacant; and no interest whatever had been paid since October, 1883. Meanwhile the property immediately adjoining that comprised in the mortgage had been covered with buildings of an inferior class, the back windows of which overlooked the mortgaged property. Owing, as it appeared from the evidence, chiefly to this circumstance, and partly also to the depression of trade in *Liverpool*, the value of this property much decreased, and in May, 1879, Mr. *Paterson Kerr* inspected the property and made a further report upon it, from which the following is an extract:—

"We regret very much to find that ever since our survey in 1875, when we recommended the security as being amply suffi-

cient for the advance of £5000, a very great alteration has taken place in its immediate surroundings. What was once an open country lying between *Sefton Park* and *Grove Park* has unfortunately been dealt with by the Earl of *Sefton* in a manner which has materially prejudiced not only this property but the whole of the surrounding property of a first-class character. The land has been let or sold by his lordship for the erection of houses of an inferior description, and the arrangements still to be completed must when carried out still further interfere with the value of your security. It is, therefore, to us a source of gratification that the property in 1875 afforded such an ample margin as it did for the advance then made upon it, as we hope that by taking action at once there may be no difficulty in obtaining such a price now as will secure the repayment of the mortgage."

Mr. *Benyon-Windsor* died in November, 1879, and all attempts to sell the property for a sum sufficient to pay off the mortgage having failed, this action was brought on the 6th of June, 1883, by Mrs. *Fry* and her four children against Mr. *Tapson* and the executors of Mr. *Benyon-Windsor*, in order to obtain a declaration that the mortgage investment was an improper one and was made by the wilful default of the trustees, and to have the mortgage realized, and any loss to the trust estate occasioned by such improper investment and wilful default made good by the trustees, with ancillary relief.

Before the commencement of the action Mr. *Paterson Kerr* had also died.

The Plaintiffs by their statement of claim alleged in support of the charge of wilful default that the trustees had advanced the £5000 upon a report and valuation made on behalf of the mortgagor alone, and that such report and valuation shewed upon the face of it that the security was not a sufficient one for an advance of £5000 by trustees, and they alleged that if the property was now sold it would not produce two-thirds of that amount.

The defence was that in making the investment the trustees had acted with all due care and prudence under the advice of experienced solicitors, and upon a report and valuation not made on behalf of the mortgagor, but by a competent valuer, who was not known to them to be an agent of the mortgagor; that the

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property was not an insufficient security at the date of the investment, and that its subsequent depreciation could not have been anticipated by the trustees, and had happened through no fault or neglect of theirs. It was, moreover, alleged by the Defendants that the change of investment was made upon the solicitation of Mrs. *Fry*, who was not in affluent circumstances, and in order to produce her a larger income, and that the security was accepted with her knowledge and approval.

Upon the trial of the action several *Liverpool* surveyors were examined as to the comparative value of the mortgaged property at the date of the mortgage and at the present time. These gentlemen mostly placed its present value at from £3500 to £3700, and Mr. *Boult*, a *Liverpool* estate agent, who was called on behalf of the Defendants, stated its value to be from £3000 to £3500.

There was more difference of opinion as to its value in 1875. Mr. *Sherlock*, an architect and surveyor of thirty-five years' experience in *Liverpool*, said that its utmost value in 1875 was £5000, that a street had been projected by Lord *Sefton's* agents to come down to this neighbourhood, and had actually been begun more than a quarter of a mile away from the property, and that this building scheme has been carried out since the year 1876.

Mr. *Whiteman*, another *Liverpool* architect and surveyor of experience, placed the value of the house in 1875 at the sum of £4659.

Mr. *Hermann*, a witness for the Defendants, estimated the value in 1875 at £6700, but he said that £4500 would have been an outside sum for trustees to advance upon mortgage, and that he should have anticipated the depreciation which has taken place.

Mr. *Boult* said that the property was sold to Mr. *Campbell* in 1868 for £5000; that before 1873 he added some large rooms to the house, and very much altered the character of the place, but that in 1873 the witness advised Mr. *Campbell* that he would not be likely to get more than £8500 for it, and that the value diminished between that time and 1875. This witness was examined as to Mr. *Paterson Kerr's* report in 1875, and stated that he agreed in the main with it, though it was a little high-flown;

but he added that the property was one which did not to his mind recommend itself as a security for trust-money, it was too expensive a house for most people, and was not easy to let or sell; it might have been a good security for £4000 or £4500; and on being cross-examined, he said that the mortgagees' attention should have been called to the probability of the adjoining land being built upon, and that, taking that into consideration, he would not have lent money upon it at all.

Several solicitors, including Mr. *Sladen*, Mr. *Woodhouse*, and Mr. *Paterson*, were called as witnesses and examined as to the usual practice with reference to the selection of valuers in mortgage transactions, and the result of their evidence will be found in the judgment of his Lordship.

Finlay, Q.C., and *C. C. Macrae*, for the Plaintiffs:—

The evidence shews that Mr. *Tapson* left the conduct of the transaction to his co-trustee, and that such co-trustee was contented with a valuation made by the borrower's agent, who was a *London* auctioneer, without any local knowledge, and with a pecuniary interest in the mortgage money being lent. This is conduct amounting to wilful neglect and default. For the choice of a valuer is a matter on which trustees ought to exercise their own judgment, and which they are not justified in leaving to their solicitors. The choice of valuers is no part of the ordinary business of the solicitors, who can make no charge for such a service. Moreover, even assuming this valuation to have been correct, the trustees lent more than half the value on house property. Accordingly it is no sufficient defence that the trustees employed solicitors of experience in the transaction; and the trustees must make good to the trust the £5000 advanced upon this improvident investment with interest from the time of the loan. They referred to *Ingle* v. *Partridge* (1).

Hastings, Q.C., and *H. R. Woodhouse*, for the Defendant *Tapson*:—

If trustees in the conduct of the business of the trust act with reasonable care and prudence, and in an ordinary course of

(1) 34 Beav. 411.

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business employ an agent, as a prudent man would do in the conduct of his own business, they are not liable for the default of the agent they so employ: *Speight* v. *Gaunt* (1); *Godfrey* v. *Faulkner* (2). Here the trustees were obliged to employ solicitors to conduct this mortgage transaction, a matter entirely within the ordinary functions of solicitors but beyond the capacity of laymen. They employed solicitors of experience and standing, and even if the solicitors have acted with such negligence as to give the trustees a right of action against them, the *cestuis que trust* have no remedy against the trustees themselves, though they could no doubt compel the trustee to enforce against the solicitors and in favour of the trust estate any right which the trustees could themselves exercise. It is quite a usual practice for the solicitor, who is continually brought in contact with surveyors, to select the valuer, the lay client has usually no means of doing so himself, and it would add a fresh and most deterrent risk to the already onerous position of a trustee if he is to be obliged to follow his solicitor and valuer all over the country in order to see that they are doing their duty, on pain of having to make good every shilling of loss occasioned by any omission on their part. The solicitors here stated that they were about to obtain an auctioneer's valuation, and the trustees were justified in leaving it to them to employ a proper person. There is nothing to fix them with knowledge who the valuer was, or that there was any connection between him and the mortgagor, or between him and the writer of the extract sent to their solicitors.

W. Pearson, Q.C., and *Sefton Strickland*, for the executors of Mr. *Benyon-Windsor*.

Finlay, in reply:—

Mr. *Tapson* cannot be said to have entrusted the matter to his solicitors, for he in fact entrusted it to his co-trustee; and the result of the evidence is that the co-trustee must have known that *Kerr*, the mortgagor's agent, was the author of the report and the only valuer for the mortgagees, and even if he did not know this, the puffing nature of the report shewed its source and should have

(1) 22 Ch. D. 727; 9 App. Cas. 1. (2) 23 Ch. D. 483.

put him on inquiry. He referred to *Budge* v. *Gummow* (1); *Hopgood* v. *Parkin* (2); *Sutton* v. *Wilders* (3); *Bostock* v. *Floyer* (4).

KAY, J.:—I will look through the evidence again and give judgment shortly.

Aug. 1. KAY, J.:—

The arguments in this case have raised some very important questions as to the duties of trustees investing money on mortgage. There were here two trustees who had a fund which they were desirous of so investing. Such an investment was entirely within their powers, and they seem to have been actuated by a wish to increase, if they could do so, the income of the tenant for life. Accordingly they sold out the fund which was in Bank Annuities and invested it on mortgage under the circumstances which I will proceed to describe. [His Lordship then stated the facts of the case to the foregoing effect, and in the course of such statement remarked that the effect of the correspondence between Messrs. *Roy & Cartwright*, Mr. *Benyon-Windsor*, and Mr. *Tapson* was, so far as Mr. *Tapson* was concerned, to make him liable for everything done by his co-trustee, Mr. *Windsor*, under the authority delegated to him by Mr. *Tapson's* letter of the 20th of August, 1875. His Lordship then continued:—]

There is no substantial dispute among the witnesses that the loan was an extremely improvident one for trustees to make. The facts shew strongly the wisdom of the general rule that not more than one-half the estimated value should be lent by trustees upon house property. No prudent man reading Mr. *Kerr's* report of 1875 would have put the value of the property as a security for trust money higher than £7000, and to lend £5000 upon it was obviously rashly to disregard the ordinary rule. But the most incautious act was to employ Mr. *Kerr* to value for the mortgagees, and to accept his report as a sufficient evidence of value.

He was a *London* surveyor, not shewn to have any of that local knowledge which was so important in this case, and his employ-

(1) Law Rep. 7 Ch. 719.
(2) Ibid. 11 Eq. 74.
(3) Law Rep. 12 Eq. 373.
(4) Ibid. 1 Eq. 26.

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ment was inexpedient for that reason: *Budge* v. *Gummow* (1). He was employed by the mortgagor to find a borrower. He was interested in doing so. His commission of £75 depended on his success. He had written recommending the property in terms which read more like the language of an auctioneer puffing what he had to sell than of a man exercising a calm judgment upon its value as a security for a loan of trust money: and solicitors of experience, who have been called on the part of the Defendants, have all confirmed my impression that no prudent lender, whether a trustee or not, would have been satisfied with his valuation under such circumstances.

But then it has been argued, supposing his valuation to be excessive, and that it was improper to act upon any valuation by him, the trustee employed competent solicitors, who instructed Mr. *Kerr*, and that this completely absolves them. And I have been pressed with the authority of *Speight* v. *Gaunt* (2) and other cases as deciding this question in their favour.

Speight v. *Gaunt* did not lay down any new rule, but only illustrated a very old one, viz., that trustees acting according to the ordinary course of business, and employing agents as a prudent man of business would do on his own behalf, are not liable for the default of an agent so employed. But an obvious limitation of that rule is that the agent must not be employed out of the ordinary scope of his business. If a trustee employs an agent to do that which is not the ordinary business of such an agent, and he performs that unusual duty improperly, and loss is thereby occasioned, the trustee would not be exonerated.

Suppose, for example, that in selling trust property, or changing an investment, trustees were to allow the trust fund to pass into the hands of their solicitors, and that it was lost in consequence, they would be liable. I take that illustration because I am afraid it not unfrequently happens that trustees do allow trust funds to be in their solicitors' hands without sufficient reason. It would be no excuse to say, as one of the witnesses said in this case, "Solicitors often do so." The question is not what they often do, but what is properly within the scope of their employment as solicitors.

(1) Law Rep. 7 Ch. 719, 722. (2) 22 Ch. D. 727; 9 App. Cas. 1.

Suppose in *Speight* v. *Gaunt* (1) the trustee had exercised no discretion as to the choice of a broker, but had left that to his solicitors, who had employed a man known to them to be untrustworthy, would the trustee have been exonerated? In my opinion clearly not, because he would have delegated to his solicitors that which was not properly the business of the solicitors, but a matter as to which his own judgment should have been exercised.

Now, is it part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage? To take Lord *Hardwicke's* words in *Ex parte Belchier* (2), is that a case "where trustees act by other hands, either from necessity or conformable to the common usage of mankind"? I should suppose not. But the matter is not left in any doubt. Some eminent solicitors have been called on behalf of the Defendants, and they all agree that this is not the solicitor's business, but that if asked to name a valuer, the ordinary course is to submit a name or names to the trustees and to tell them everything which the solicitor knows to guide their choice, but to leave the choice to them. If, therefore, this unfortunate investment is owing, as I cannot help thinking is the case, to the employment of a valuer whom no prudent person would have employed, I cannot hold the trustees exonerated because such valuer was appointed not by them but by their solicitors, if the fact were so.

It has been necessary to consider this question partly because the defence was mainly rested upon it, but also for another reason. Watching the evidence as it was given, I observed that no attempt was made, in the first instance, to shew that the trustees knew that the valuer employed was the same person who had written the letter, an extract from which had been sent to them. His name does not appear in that extract nor in the letters accompanying it. But Mr. *Cartwright* was recalled by the Plaintiffs, and then said that he had no doubt that he communicated that fact to Mr. *Windsor*. I cannot, by reason of his death, have Mr. *Windsor's* testimony on this point. However, it would certainly be Mr. *Cartwright's* duty to make the statement, and I cannot, in the face of his evidence, assume that it was not made. Unfortunately he does not say or suggest that he cautioned Mr. *Windsor*

(1) 22 Ch. D. 727; 9 App. Cas. 1. (2) Amb. 218.

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against employing Mr. *Kerr*, or that he suggested the employment of a local agent. The impression I derive from the evidence is, that Mr. *Cartwright*, who had known *Kerr* previously, suggested his employment to Mr. *Windsor*, and that this imprudent suggestion was imprudently assented to. If Mr. *Cartwright* was to blame in doing this, so also was Mr. *Windsor*, and no attempt to throw blame on one would exonerate the other. If I am to deal with the case on the footing that these facts were known to Mr. *Windsor*, the case against the trustees is more direct, if not stronger, and no advice of their solicitor would relieve them from the consequence of knowingly employing an improper valuer.

I am most reluctant to visit trustees acting *bonâ fide* with the consequences of a want of due caution, but I cannot avoid the conclusion that the trust fund has been diminished, if not lost, by their fault. They neglected the rule of not lending more than half on house property. They most incautiously employed the mortgagors' agent, who had been puffing the proposed security and was interested in obtaining the loan, to value on their behalf, and they accepted his valuation without attempting to check it, and this although he was a *London* surveyor, and it was most important to obtain the opinion of some experienced local surveyor as to property of this kind.

I regret to be obliged to declare them jointly and severally liable to replace the £5000, with interest at 4 per cent. from the time of the loan, against which interest must be set off the sums paid to the tenant for life. There must be an order upon the surviving trustee and the executors of the deceased trustee to pay the amount within three months. If the executors of Mr. *Windsor* do not admit assets, there must be the usual creditor's decree against them. The Defendants must pay the costs of the action. Of course, upon payment of the £5000 and interest the Defendants will be entitled to the mortgage.

Solicitors: *Vallance & Vallance; Joseph Pearce; Roy & Cartwright.*

W. W. K.

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[1884 A. 1476.]

Sewer—Local Authority, vesting in—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), s. 13—*Obstruction by Owner of Soil—Injunction.*

A sewer made by the owner of some only of the houses in a street not yet a highway, though made for the purpose of draining his own amongst other houses, is not a sewer made by a person "for his own profit" within the meaning of the exception in sect. 13 of the *Public Health Act*, 1875.

The word "sewer" in that Act should receive the largest possible interpretation, and a drain is a "sewer" within the meaning of sect. 13 when more than one house has been connected with it.

THE Defendant was the owner in fee of four houses, two on each side of "*The Avenue*," a street which was not yet a highway, situate in *Bedford Park*, in the parish of *Acton*, and was also the owner of that part of the soil of the street which lay between the houses. A Mr. *Carr* was the original owner of the greater part of the *Bedford Park* estate. He had sold to the Defendant his above-mentioned property, and had also parted with a considerable portion of the estate, but he still retained a part of it, and in particular two houses in "*The Avenue*," numbered respectively 7 and 9. Along "*The Avenue*" there was a drain with which certain of the houses in the street were connected, but for this drain a good outfall could not be obtained, and in the year 1882 an arrangement was entered into between Mr. *Carr* and the *Acton* Local Board under which he undertook to make a sewer along "*The Avenue*" at a certain level to one of the pumping stations of the local board, and they undertook to receive the sewage coming through this new drain and to pump it into one of their main outfall drains. In order to enable him to make this new sewer, *Carr* applied to the Defendant for permission to carry a portion of it through his land, and, after some negotiation, the Defendant gave him permission to do so upon condition (according to the evidence) that *Carr* should connect the Defendant's houses with the new sewer at his own expense. The sewer was then made, and it was in evidence that "in or about the month of September," 1884, three houses situate as to the line of drainage

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above the Defendant's houses had been connected with the new sewer, of which three houses two were Nos. 7 and 9 aforesaid, and the third belonged to a Mr. *Fulton*. Under these circumstances, the Defendant, whose houses had not been connected with the new sewer, after having in vain requested Mr. *Carr* to carry out his engagement, on the 15th of October, 1884, in order to assert his rights, cut a piece out of the new sewer and blocked it where it passed through his land. Thereupon the *Acton* Local Board, as the local authority in whom all sewers within the district were vested, brought this action against the Defendant for an injunction to restrain him from blocking up or interfering with the sewer; the writ in the action being issued on the 24th of October. Mr. *Carr* made an affidavit in support of the Plaintiffs' case, in which he deposed that he did not make the sewer for his own profit, but for the purpose of draining the houses in the street, of which some did and others did not belong to him.

Hastings, Q.C., and *E. H. Pollard*, for the Plaintiffs:—

The *Public Health Act*, 1875, by sect. 13 vests in the local authority "all existing and future sewers" within their district, with certain exceptions, of which the only one which can possibly apply to the present case is this: "except sewers made by any person for his own profit." The sole question, therefore, is whether this sewer was made by *Carr* for his own profit, and it is quite clear it was not so made.

[They were then stopped by the Court.]

W. Pearson, Q.C., and *Rose-Innes*, for the Defendant:—

This drain was not a "sewer" within the meaning of the *Public Health Act*, 1875, s. 13, when the Defendant obstructed it, for there is no sufficient evidence that any house had been connected with it on or before the 15th of October; and, secondly, if it was a sewer at that time it is within the exception, because, being made by *Carr* for the improvement and advantage of his property, it was made for his own profit.

KAY, J. (after stating the case):—

There is no question that the two houses belonging to Mr. *Carr* and the house belonging to Mr. *Fulton* had been connected with

this sewer before the issue of the writ in this action; and as the evidence for the Plaintiffs, not contradicted by the Defendant, is that they were so connected in or about September, 1884, I draw an inference of fact that they had been connected with the sewer before the Defendant blocked it on the 15th of October.

That being the state of the case, of course the only question between the local board and Mr. *Batten* is, Was this a sewer which was vested in them? The 13th section of the *Public Health Act*, 1875, provides that "all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except" as therein mentioned, "shall vest in and be under the control of" the local authority. The only exception which could possibly apply to this case is "sewers made by any person for his own profit." Now I have not the least doubt that this does not come within that exception, because Mr. *Carr* swears that he did not make this sewer for his own profit at all. He made it for the purpose of draining all the houses in this street, many of which do not belong to him. It was, no doubt, for the purpose of draining his own houses among others, and the two houses which do belong to him have been connected with it. But if a sewer so made for draining a street of houses would be considered a sewer for the profit of the person who made it, because he connects some of his houses, all I can say is, that almost every sewer in every street of every suburb of every town in *England* might be considered a sewer made for the profit of the person who constructed it. It is quite clear that is not the meaning of the Act. It was, indeed, very faintly argued, and I have not the least doubt that this sewer does not come within that exception.

Then the remaining question is, whether this is a sewer within the meaning of the Act: it is said it is not a sewer because there is no sufficient evidence that any house had been connected with it before it was blocked up by the Defendant on the 15th of October. Although the evidence is by no means so clear as I should like, I must, as I have said, infer that it was made, at least as to these three houses of *Carr* and *Fulton*, before that 15th of October. Therefore, when the Defendant took upon himself to block it, it was a drain, and evidently made for the purpose of

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being a sewer down a street, which I understand has not yet become vested in the local board, and is not yet a highway.

Now the words of the Act are as large as can be. In the interpretation clause, at sect. 4, it says, "'Drain' means any drain of and used for the drainage of one building only." Then the next clause says, "'Sewer' includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

I therefore cannot have any doubt as to the meaning of the Act. It was to give the largest possible interpretation to the word "sewer," and most clearly to include a drain like this, actually laid down and intended to be connected with all the houses in an intended street which required to be connected with it. That must be within the meaning of the word "sewer," at any rate, after more than one house had been connected with it. It seems to me to be proved that more than one house had been connected with it before the 15th of October. The act done on that day was a wrongful act, and it is very clear that when this writ was issued any attempt to interfere with this sewer without leave of the *Acton* Local Board was certainly wrong.

Mr. *Batten* may have been extremely ill-treated by Mr. *Carr*, though I do not say that he has been, because Mr. *Carr* is not here. Mr. *Carr* may not have carried out the arrangement under which Mr. *Batten* allowed this sewer to be made through his land, but the question here is not between Mr. *Batten* and Mr. *Carr*. The question is whether the local authority in whom this sewer is vested have not thereby acquired a right which, notwithstanding any wrong done by Mr. *Carr* to Mr. *Batten*, makes it an illegal act for Mr. *Batten* to stop this sewer without their leave. I think that is so, and accordingly I grant an injunction to restrain the Defendant from blocking the sewer or from interfering with it otherwise than for the purpose of connecting his own houses with it.

Solicitors: *Alexander Hemsley; Batten, Proffitt & Scott.*

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FOAKES *v.* WEBB.

[1883 F. 2390.]

Practice—Discovery—Privileged Communication—Answer to Interrogatory—Sufficiency of—Professional Confidence—Solicitor and Client.

The privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the case of the client in the action.

A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to an agreement the specific performance of which it was the object of the action to enforce.

The defendant declined to answer the interrogatory, so far as it related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action :—

Held, that he must make a further answer.

ADJOURNED SUMMONS.

This was an action by *J. P. White* and *A. M. Foakes*, for specific performance of an alleged agreement by the Defendants *Webb & Gibbons* to sell a field at *Great Dunmow*, in *Essex*, to the Plaintiff, *J. P. White*.

The alleged agreement was contained in a receipt dated the 28th of September, 1883, and in the following terms :—

"Received from Mr. *J. P. White* the sum of Ten Pounds as deposit on sale of *High Street Field* for £330. Purchase to be completed by December 25, 1883.

"£10 0 0 (Signed) *Webb & Gibbons.*"

The Defendants in April, 1884, delivered a statement of defence in which they denied that the receipt contained the true terms of the agreement, one of which terms they alleged to be that the solicitors of the Defendants were to act for the Plaintiff, *J. P. White*, in relation to the sale.

The Plaintiffs then delivered interrogatories to the Defendants, of which the first was as to the alleged agreement to employ the

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solicitors of the Defendant, and was substantially answered, and the second was as follows:

"Is it not the fact that between the 13th of November and the date of the delivery of the defence in this action numerous or some or how many interviews took place and a large amount of correspondence passed between the Plaintiffs' solicitor, Mr. *E. F. Foakes*, and the Defendants' said solicitors, and also between *Charles C. Lewis* and the Defendants' said solicitors, or one of them, in relation to the said agreement, and to the terms and completion thereof?"

Mr. *C. C. Lewis* was a friend of Plaintiff *A. M. Foakes*.

To the second interrogatory, the Defendants made answer as follows:—

"We decline to answer the second interrogatory so far as it relates to communications between our solicitors and other persons, on the ground that we have no personal knowledge of these matters, and that the only information we have relating to these matters is derived from confidential communications between us and our solicitors in reference to our defence to this action.

This was a summons taken out by the Plaintiffs for further answers to both these interrogatories, and adjourned into Court.

Lyttleton Chubb, for the Plaintiffs, in support of the summons:—

An answer that the interrogated party has no personal knowledge in the matter is not sufficient, he must answer to the best of his information and belief: *Bray* on Discovery (1).

The privilege arising from professional confidence between solicitor and client does not extend to matters outside the confidential relation between them, or to communications to or from the opposite side. The question here is as to open communications between the solicitors on each side, and between the Defendants' solicitor and a third party, which are clearly not privileged.

Levett, for the Defendants:—

The denial of personal knowledge is coupled with a reference

(1) Pages 127, 128.

to the only information possessed; and that information is privileged as confidentially communicated to the Defendants by their own solicitors in reference to their defence in the action.

Chubb, in reply, referred to *Bray* on Discovery (1); *Griffith* v. *Davies* (2); *Spenceley* v. *Schulenburgh* (3); *Pavitt* v. *North Metropolitan Tramways Company* (Q. B. D., May 30, 1883).

KAY, J.:—

I must say that in my opinion this is rather like a revival of the old disputes about answers in Chancery. However, it is my duty to determine whether a further answer ought to be given to these interrogatories. As to the first of them, it is substantially answered.

The second is answered thus: "We decline to answer the second interrogatory so far as it relates to communications between our solicitors and other persons, on the ground that we have no personal knowledge of these matters." So far that is not enough, for they are bound to answer as to their information and belief, and upon that they do not say a word. But then they go on to say, "and that the only information we have relating to these matters is derived from confidential communications between us and our said solicitors in reference to our defence of this action." The answer then comes to this, "whether our solicitors have had communications with the other side or not is a fact as to which we have no personal knowledge. We have information which our solicitors have given us, but we say that such information is a confidential communication." Now suppose a letter had been written by the solicitors of the one side to the solicitors of the other side, and it became important to prove the handwriting, and one of the parties, in reply to an interrogatory as to the handwriting, had said, "I have no personal knowledge of the handwriting, and any information I may obtain from my solicitors is privileged." Would that answer be sufficient? In my opinion information of that character cannot be privileged. That would be an entire perversion of the rule of privilege as to protected

(1) Pages 364, 432, 434.
(2) 5 B. & Ad. 502.
(3) 7 East, 357.

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communications. The fact that the solicitor was the person who signed a letter to the other side cannot be a confidential communication. Suppose the solicitor himself were asked that question in the witness box, he could not claim privilege and would be obliged to answer. If the solicitor must answer, can his client refuse to do so on the ground that he has no personal knowledge, and the only information he can get is from the solicitor who would himself be bound to answer? The privilege of the solicitor is the privilege of the client; and how can there be a privilege as to a fact which is so outside the relation between them that it could not be the subject of a confidential communication?

I will now go to the authorities. The cases which touch the question most nearly are collected in Mr. *Bray's* excellent book on Discovery (1). Take the case of *Griffith* v. *Davies* (2) which has been referred to. In that case it was said (I am reading from Mr. *Bray's* book (3)) "that the attorney could not refuse to state what he had communicated to the opposite party by order of his client, for it was not a confidential disclosure but an open communication from one adversary to another, something which had been already said to the plaintiff . . . . and accordingly in this case he was held bound to state what passed at a conversation between the plaintiff and defendant respecting a compromise at which he was present as the defendant's solicitor." So here the question is, did the Defendants' solicitor communicate with the other side. As the solicitor never could protect himself from answering that question if he were in the witness box, it seems to me impossible to say that his client could refuse to answer an interrogatory as to that external fact, on the ground it is privileged. In this particular case the whole dispute is somewhat idle, and yet I cannot say that the interrogatory is wholly irrelevant to the matters which are going to trial. Therefore, although I think there must be an order for a further answer to this interrogatory, I decline to give any costs of the application.

Solicitors: *E. T. Foakes; Park Nelson, Morgan & Gemmell;* agents for *Wade, Wix & Wade, Dunmow.*

(1) Pages 138, 434. (2) 5 B. & Ad. 502.
(3) Page 434.

W. W. K.

KAY, J.
1884
Nov. 29;
Dec. 5, 6.

In re DICKSON.
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[1884 D. 2386.]

Will—Legacies payable contingently on Legatees attaining the age of twenty-one —Gift of Residue—Sum not actually set apart by Executors—Intermediate Income—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Section 43 of the *Conveyancing and Law of Property Act*, 1881, applies only to cases where, apart from that section, the intermediate income would belong to the infant on the gift of the *corpus* becoming absolute.

The cases of *In re Cotton* (1) and *In re George* (2) discussed.

ADJOURNED SUMMONS.

George Dickson, who died in September, 1883, by his will made in August, 1883, after appointing two executors, and giving several legacies, gave "to each of the children who shall be living at my death and attains twenty-one, of the following persons, viz:" his half sisters, *Catherine Duthie*, *Jane Mason*, and *Margaret Don;* his half brother, *James Ley;* and his niece, *Mary Paton*, "the sum of £1000, and in case any of the children of my said half sisters, half brother, or niece shall die in my lifetime, leaving children who shall be living at my death and attain twenty-one, then I give a sum of £1000 to and equally between such children of each child of my said half sisters, half brother, or niece so dying." The testator gave unto his executors, their heirs, executors, and administrators all his real estate and the residue of his personal estate upon trusts to convert into money, and out of the proceeds of such conversion to pay his funeral and testamentary expenses and debts and the legacies bequeathed by his will, and to stand possessed of the residue of his estate after answering the purposes aforesaid "Upon trust for all my nephews and nieces living at my death whether any such nephew or niece is a child of a brother or sister or of a half brother or half sister of mine in equal shares among them."

Several of the children of the five persons named being infants, a question arose under the 43rd section of the *Conveyancing and*

(1) 1 Ch. D. 232. (2) 5 Ch. D. 837.

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Law of Property Act, 1881, whether they would be entitled to have the income of the contingent legacies, or part of it, paid or applied for their maintenance and education during minority; and be entitled to the accumulations, if any, in case they should attain majority.

A summons was taken out by the Plaintiff, the surviving executor, asking for a declaration by the Court on the question, *inter alia*, whether the infants had any right to the income. The summons came on to be heard on the 29th of November, and the question was, by direction of the Court, re-argued on the 5th of December.

It was admitted at the Bar that the sums necessary for satisfying the infants' legacies had not been actually set apart by the executors.

Langworthy, for the Plaintiff, stated the facts.

Hastings, Q.C., and *H. McNab Humphry*, for the infant legatees:—

The 43rd section of the *Conveyancing and Law of Property Act*, 1881, enacts that where any property is held by trustees in trust for an infant whether absolutely or contingently on his attaining the age of twenty-one, the trustees may in their discretion pay or apply the income of that property, or any part thereof, for or towards the infants' maintenance or education, and it is submitted that these legacies, which are clearly property held by trustees in trust for infants on attaining twenty-one, are within the meaning of the section; that the income of the legacies given to the legatees contingently on their attaining twenty-one can be applied during their minority towards their maintenance, and that the accumulations of the surplus income, if any, will belong to them on their attaining that age.

Such an application of the income will be in accordance with the plain words of the section, which, as stated in *Wolstenholme* and *Turner's* Conveyancing Acts (1), was so drawn to prevent any question arising under *Lord Cranworth's Act*, 1860 (23 & 24 Vict. c. 145, s. 26), as to the application of income, as in the case

(1) 3rd Ed. p. 95.

of *In re George* (1), where the Court of Appeal held, overruling Vice-Chancellor *Hall*, who followed the decision of the late Master of the Rolls in *In re Cotton* (2), that legacies given to daughters on their attaining twenty-one, or being married, did not carry interest until the time of payment, and that the Court had no power to apply any part of the income of the expectant legacies for maintenance during minority; but such a question as the present will not be prevented from arising if the Court should hold that the 43rd section does not enable trustees to apply for an infant's maintenance the income of a legacy to which he is contingently entitled—the income of a legacy to which he may never become entitled. The decision in *In re Buckley's Trusts* (3) supports the case of *In re Cotton*, and it is submitted that the infants are entitled to the income accruing during their minority.

Farwell, for residuary legatees:—

In *In re Judkin's Trusts* (4) the Court held that trustees cannot, under sect. 43 of the Act, 1881, apply the income of an infant's contingent legacy for the benefit of the infant unless the income will go with the legacy when it vests. The Act of 1881 does not apply to this case, and the question which arose in *In re George* has not been avoided. If the legacies had been set apart it would not have had the effect of causing them to carry interest in favour of the infants: *Festing* v. *Allen* (5). The result of the construction of the 43rd section asked for on behalf of the infants would be to take away from the residuary legatees the intermediate income to which the will entitled them, and such a construction would be the more remarkable as clause 4 of the section is retrospective. The Act of 1881 had for its object the improvement of conveyancing, and was not passed for the purpose of altering the rights of any person, and the true construction of the 43rd section is, as submitted, that the infants will be entitled to maintenance, in any case in which they are or may become absolutely entitled to any income, and not otherwise. He also referred to *Turner* v. *Sargent* (6).

(1) 5 Ch. D. 837.
(2) 1 Ch. D. 232.
(3) 22 Ch. D. 583.
(4) 25 Ch. D. 743.
(5) 5 Hare, 573.
(6) 17 Beav. 515.

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John M. Lloyd, for other legatees in the same interest:—

Under this will there is no income to which the infants would be entitled under *Lord Cranworth's Act*, and it should not be assumed that the *Conveyancing and Law of Property Act*, 1881, was intended to go any further than the Act of 1860.

Hastings, in reply.

KAY, J.:—

In this case the testator gave legacies of £1000 to classes of persons who should be living at his death and attain twenty-one, and then follows a residuary gift to all his nephews and nieces living at his death. The classes of persons to whom these legacies are contingently given are not children of the testator, or persons to whom he was *in loco parentis*. There is no direction to set apart the legacies nor any reason for doing so, except that the residue being payable at once it may be necessary to retain a sufficient part of such residue to provide for them in case they should become payable. Whether actually so retained or not, there is no doubt that under the will the income, until the legatees attain twenty-one, would belong not to them but to the donees of the residue. Until these contingent legacies are payable the fund, if reserved, is only residue, and the legatees, even should they attain twenty-one, will not be entitled, under the will, to the intermediate income of the fund so retained, but that income is part of the residue and belongs, under the will, to the residuary legatees: *Festing* v. *Allen* (1); *In re George* (2). The question which I have to determine is whether sect. 43 of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), which by clause 1 enacts that "where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any

(1) 5 Hare, 573. (2) 5 Ch. D. 837.

fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not," entitles the infant legatees to this income in case they should attain twenty-one and to maintenance out of it in the meantime. Assuming that £1000 has been retained out of the residue to answer one of these legacies if it shall become payable, is that "property held by trustees in trust for an infant . . . contingently on his attaining the age of twenty-one years?" If he does attain twenty-one, that sum to the extent of £1000, supposing that all the rest of the residue has been distributed, will be payable to him, and therefore it is difficult to say that the case does not come within those words. The fact that the sum has not been actually set apart, as was admitted during the argument, can make no difference. If not, a portion of the residue must be held in trust for the infant contingently on his attaining twenty-one. The 43rd section of the Act of 1881 was intended to replace a provision in *Lord Cranworth's Act* (23 & 24 Vict. c. 145, s. 26), which has been repealed by sect. 71 of the Act of 1881. *Lord Cranworth's Act* only enabled trustees to apply for maintenance the income to which the infant "may be entitled in respect of such property," and it was decided by the Court of Appeal in *In re George* (1) that in the case of a contingent legacy which did not carry interest, the income of a fund paid into Court to the contingent legacy account could not be so applied, because even if he attained twenty-one the legatee would not become entitled to any of the intermediate income. That decision was in 1877, and the *Conveyancing and Law of Property Act* was passed in 1881. In *Wolstenholme's* and *Turner's* 2nd and 3rd Editions of the Conveyancing Acts (2) it is stated in a note that this section (43) "is so worded as to avoid the question raised in" *In re George.* In the same note the learned editors say that "if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the section can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of the section seems capable of being stated thus: Where the income will go along with the capital if and when the capital vests, then the income

(1) 5 Ch. D. 837.
(2) 2nd Ed. p. 86; 3rd Ed. p. 95.

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is applicable under the section for the benefit of the infant, otherwise not." But if that is the effect of the Act it does not avoid the question raised in the case of *In re George* (1). The precise question in *In re George* was whether *Lord Cranworth's Act* applied to income to which the infant never could become entitled, and if the Act of 1881 was passed to avoid the effect of *In re George*, the intention must have been to enable the trustees to maintain the infant out of income of a contingent legacy, which income but for the Act would belong to someone else and not to the infant even though he should attain twenty-one. I have communicated with Mr. *Wolstenholme*, who tells me, and allows me to state, that the note in question is erroneous. The reference should have been to *In re Cotton* (2). In that case the income of the legacy would belong to the legatee if he attained twenty-one, and the question was whether *Lord Cranworth's Act* applied to such income or was only applicable to income actually vested in the infant. The Court said that the more apt expression would have been "may become" than "may be," yet held the Act applicable. Now the difficulty is, first, that there was no necessity after that decision to alter the language of the statute to make it applicable to income of that kind; and secondly, if altered for that purpose the proper alteration would have been to make the phrase "may be or become," as suggested in that judgment. But the law was altered after that case and after the case of *In re George* by striking out altogether any reference to the title of the infant to the income, and dealing with the income of any property to which he is contingently entitled as it would seem, *primâ facie*, to whomsoever such income may belong. A case may easily be put which would render this effect of the *Conveyancing and Law of Property Act*, 1881, very startling. Suppose a testator gave a considerable legacy, say of £50,000, to an infant just born if he should live to attain twenty-one, and the residue of his property to another; the case being one in which the residuary legatee would be entitled to the income of the legacy till the infant attained twenty-one. The statute of 1881, if it applies to the case, not only deprives the residuary legatee of so much of the income as is wanted for the maintenance of the

(1) 5 Ch. D. 837. (2) 1 Ch. D. 232.

infant, but it provides (sect. 43, clause 2) that "the trustees shall accumulate all the residue of that income," and hold those accumulations "for the benefit of the person who ultimately becomes entitled to the property from which the same arise," and with power to apply them at any time, "as if the same were income arising in the then current year." So that it is a statutory gift of the income, which the testator has given to the residuary legatee, to the infant who under the will could not become entitled to it in any event; and this is the more extraordinary because the provision in terms applies to wills which came into operation before the commencement of the Act (sect. 43, clause 4). Therefore, in the supposed case, if the residuary legatee had for ten years before the passing of the Act been receiving the income of the £50,000, and had formed his plans of life on the assumption that he would in any event be certainly entitled to that income for the next ten years till the infant attained twenty-one, this Act would at once deprive him of that income, and the trustees must accumulate it, and if the infant attained twenty-one must hand it over to him. This seems so extravagant that it is impossible to suppose it was the intention of the Legislature. I am driven to the conclusion that the Act could not have been intended to apply to income to which the infant never could become entitled, but which passes as residue to another person. This view is, I think, confirmed by the 3rd clause of sect. 43, which excepts the case where a contrary intention is expressed in the instrument, and also makes the whole section "have effect subject to the terms of that instrument, and to the provisions therein contained." If the will had mentioned the intermediate income, and expressly given it to the residuary legatee, that might amount to the expression of a contrary intention. But if the income is in fact so given, though not by express words mentioning it, that seems to come within the other words of the clause and to prevent the application of the section. For these reasons my opinion is that in this case the income of the contingent legacies is not subject to the provisions of sect. 43 of the Act of 1881.

Solicitors: *Sandilands, Humphry, & Armstrong.*

T. F. M.

KAY, J.

1884

Dec. 8, 9, 13.

SANGSTER *v.* COCHRANE.

[1883 S. 5687.]

Mortgage to Building Society—Mortgage Debt paid by Third Party and Deed, with Statutory Receipt indorsed thereon, handed to him—Intermediate Sale and Conveyance of Part of Mortgaged Property to Fourth Party—Effect of indorsed Receipt under s. 42 *of Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42).

Land and four houses thereon were vested in a building society as mortgagees, and on the society being paid off by the Plaintiff, by request of the mortgagor, the mortgage deed, with a receipt indorsed in accordance with the 42nd section of the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), was with other title-deeds handed to him, and the mortgagor shortly afterwards conveyed to him the property, on mortgage for a larger loan. The mortgagor had prior to the payment to the building society conveyed one house in fee to the Defendant, who was ignorant of the mortgage to the society, and he at once took possession of it, but the Plaintiff knew nothing of the sale and purchase:—

Held, that in accordance with previous decisions, though not agreeing with them, the effect of the indorsed receipt was to vest the legal estate in the Plaintiff, and to give him, to the extent of the money paid to the society and the interest thereon, priority over the Defendant's claim.

Pease v. *Jackson* (1), *Fourth City Mutual Benefit Building Society* v. *Williams and Marson* v. *Cox* (2), and *Robinson* v. *Trevor* (3), discussed.

JAMES CHAPMAN, on the 18th of January, 1872, conveyed a piece of land situate in *Herbert Road*, *Plumstead*, and four houses thereon, to the *Kent and Surrey Benefit Building Society* in fee to secure a loan of £680, and the sums which should from time to time be payable. On the 30th of April, 1881, *James Chapman*, at that time the solicitor of the Plaintiff, having previously in that month asked him to pay off the amount due to the society, and to lend him the further sum of £320, making the sum of £1000, upon the security of a first mortgage of the land and houses, went with the Plaintiff to the office of the society, and the Plaintiff paid the sum of £680 16*s.* 6*d.*, and the usual statutory receipt, under the seal of the society, was then indorsed on the deed of January, 1872, and the mortgage and other title-deeds

(1) Law Rep. 3 Ch. 576. (2) 14 Ch. D. 140–147.
(3) 12 Q. B. D. 423.

were delivered by the secretary of the society to the Plaintiff; and on the 1st of May, 1881, *James Chapman* executed a mortgage of the same land and houses to the Plaintiff in fee to secure the sum of £1000, and interest at 5 per cent. *James Chapman* having become bankrupt, the Plaintiff desired to take possession of the houses, but he found that the Defendant was in the occupation of one of them (No. 155 in the road), and he alleged that *James Chapman*, on the 12th of November, 1877, sold and conveyed it to him in fee. Neither the building society nor its trustees were parties to the deed of 1877. The Plaintiff contended that the house, No. 155, was never discharged from the mortgage of January, 1872. He stated that he had no notice of the alleged purchase by the Defendant until after the failure of *James Chapman;* and he submitted that under the circumstances he was entitled to rank, as against the Defendant, as legal mortgagee of the house No. 155 for the sum of £1000, with interest at 5 per cent., or if not for that sum, then for the amount paid by him to the society, and interest thereon at that rate, and he asked for a declaration that he was a legal mortgagee of the house for the sum of £1000, with interest, or such other declaration as should seem just.

The Defendant's case was that by the deed of November, 1877, *James Chapman*, in consideration of the sum of £320, conveyed to him the house in fee, and covenanted that it was free from all incumbrances, created or occasioned by him or any person claiming under him, and that he would upon every reasonable request, and at the expense of the Defendant, produce an indenture of the 1st of October, 1870. The Defendant stated that he took possession of the house at the time, that he had continued in the occupation of it ever since, and that he had not until these proceedings were instituted any notice that *James Chapman* (who was in November, 1877, his solicitor) had incumbered the property; he alleged that the value of the three other houses was sufficient to satisfy the amount due to the Plaintiff, and submitted that the house No. 155 was not subject to any part of the sums advanced by the Plaintiff on his security, or, if at all, only to the extent of the sum which might still be payable on the security of the deed of January, 1872; and by his counter-claim he claimed a declara-

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tion to that effect; and also that he was entitled to have the house No. 155 exonerated out of the other three houses, so far as the value of the same should extend, from the mortgage of January, 1872, and an inquiry as to their value; an account; and a reconveyance.

The Plaintiff, in reply, did not admit that the value of the three other houses was sufficient to satisfy the amount secured by the deed of January, 1872, and he submitted that even if that were the case the validity of his mortgage upon the house No. 155 would be in no way affected, and he said that he had always been willing to submit to an account, and to judgment for redemption.

Hastings, Q.C., and *Abraham*, for the Plaintiff, referred to the cases of *Fourth City Mutual Benefit Building Society* v. *Williams and Marson* v. *Cox* (1), *Robinson* v. *Trevor* (2) and *Pease* v. *Jackson* (3), and submitted that the Plaintiff was at all events entitled to a declaration that he was a legal mortgagee for the amount which he had paid to the society.

Dundas Gardiner, for the Defendant, submitted that the Plaintiff's was an idle contention, as the three houses were amply sufficient to cover the sum which he paid to the building society; that the equity of redemption in the house, No. 155, had passed to the Defendant previous to the receipt being indorsed on the deed, and that his possession of the house was, according to the decision in the case of *Holmes* v. *Powell* (4), notice to the Plaintiff of the title under which he held it, and asked for a declaration and account as to the sum which was paid to the building society.

Hastings, in reply, referred to the case of *Caballero* v. *Henty* (5).

1884. Dec. 13. KAY, J.:—

On the 18th of January, 1872, *James Chapman* by deed mortgaged four freehold houses to the *Kent and Surrey Benefit Building Society*. In April, 1881, he applied to the Plaintiff *Sangster* to

(1) 14 Ch. D. 140–147.
(2) 12 Q. B. D. 423.
(3) Law Rep. 3 Ch. 576.
(4) 8 D. M. & G. 572.
(5) Law Rep. 9 Ch. 447.

pay off the mortgage and to lend him a further sum, and accordingly, on the 30th of April in that year, they went together to the office of the building society, and *Sangster* then paid the secretary £680 16*s.* 6*d.*, and a statutory receipt was indorsed on the mortgage deed under the seal of the society and signed by two directors and the secretary. On or about the 1st of May, 1881, *Chapman* by deed mortgaged the four houses to the Plaintiff for £1000. In the meantime, on the 12th of November, 1877, *Chapman* had conveyed one of the houses to the Defendant *Cochrane*, who seems not to have made any investigation of the title nor to have required the delivery of any title-deeds, and he stated in his evidence that he did not know of any incumbrance, that he took possession immediately, that he had been in possession ever since, and that *Chapman* acted as his solicitor in preparing the conveyance to him. The Plaintiff *Sangster* knew nothing of that purchase. I have to consider what is the effect under the circumstances of the receipt indorsed upon the mortgage to the building society. That depends upon the 42nd section of the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42). The section appears to contemplate two modes of procedure, one a reconveyance to the "owner of the equity of redemption or to such persons and to such uses as he may direct," and the other a receipt like the present. Nothing is said as to the effect of a reconveyance, but with respect to the receipt it is enacted that "such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever."

In a former statute for the *Regulation of Benefit Building Societies* (6 & 7 Will. 4, c. 32) there was a similar provision (sect. 5) as to a receipt, but no mention was made of a reconveyance. The reconveyance mentioned in the later Act to the owner of the equity of redemption or to his nominee may include a case of transfer of the mortgage so as to keep it alive when required; and this being an addition to the provision as to a receipt makes it more evident that the latter applies only when the mortgage is not to be kept alive, but, as the statute expresses it, "vacated," and not "transferred." Apart from authority, I should have thought that a stranger, not interested in the equity of redemp-

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tion, paying off the mortgage, and desiring to obtain a transfer, could only do this by means of a conveyance from the building society, and that the receipt could not have the effect of vesting the property in him.

The section says that it "shall vacate the mortgage." A transfer does not "vacate" the mortgage; and the section proceeds to say that it shall "vest the estate . . . in the person . . . entitled to the equity of redemption." A stranger paying off the first mortgage is not entitled to the equity of redemption, and I cannot see how it is possible that under the words the estate should vest in him. Therefore, apart from authority, I should conclude that the only title of the Plaintiff was under his mortgage of the 1st of May, 1881, and that the effect of the receipt was that the society having accepted the payment, whether as a payment by the mortgagor or otherwise, the legal estate in the house in question vested upon the giving of the receipt by force of the statute in the Defendant, who was solely and absolutely entitled to the equity of redemption in that house.

But in *Pease* v. *Jackson* (1), where the facts were very similar to those in the present case, a man had mortgaged to a building society, under the statute (6 & 7 Will. 4, c. 32), and then made a second mortgage to the Plaintiff, and subsequently procured the *Leeds Building Society* to pay off the first mortgage, on which occasion a receipt was indorsed by the first building society and the mortgagor then gave a fresh mortgage to the *Leeds Society*, Lord *Romilly* having held, following his previous decision in the case of *Prosser* v. *Rice* (2), that the first mortgage was vacated, and that the legal estate had passed to the Plaintiffs as second mortgagees, Lord *Cairns* reversed that decision, holding that the *Leeds Society* having paid off the first building society without notice of the Plaintiff's mortgage, and having obtained the title deeds from the first mortgagees, would have, independently of the Act, a better equity to call for the legal estate, and he said, in effect, that the operation of the statute was that either by virtue of the receipt the legal estate passed to the mortgagor from whom the *Leeds Society* had the best right to take it, or to the *Leeds Society*, as being one of the persons entitled to the equity of redemption, who had the best right to call for it, having

(1) Law Rep. 3 Ch. 576. (2) 28 Beav. 68.

become, as his Lordship said, in substance, transferees from the first building society. I must, of course, be wrong, but with deference I should have thought it clear that if the payment was made by the mortgagor the legal estate would vest in the second incumbrancer, as the person entitled to the equity of redemption, and if the payment was not by the mortgagor but by the *Leeds Society*, the legal estate could not vest in them because as transferees they were entitled not to the equity of redemption but to the mortgage which was prior to the equity of redemption. The difficulty which occurs to me is that this mode of applying the statute seems to be effecting a transfer by means of a provision which was not applicable to a case of transfer, but only to a payment which should absolutely discharge the mortgage. Not only is that a decision binding upon me, but it has been followed in the subsequent case of *Lawrence* v. *Clements* (1). In the *Fourth City Mutual Benefit Building Society* v. *Williams and Marson* v. *Cox* (2) the late Master of the Rolls applied the same rule to a case under the statute of 1874. There the mortgagor mortgaged property called *Summerfield*, first to a building society, and secondly to *Colman*. The mortgagor then paid off the building society, and a statutory receipt was indorsed on the deed. *Colman* knew nothing about that transaction, but the Master of the Rolls held, as I should have done, that the legal estate vested in him. The mortgagor also mortgaged property called *Glenmore House*, first to the same building society, next to the *General Credit Company*, and thirdly to the *Marsons*, who, on the same day, but after the execution of the mortgage deed to them, paid off the building society, who indorsed a statutory receipt, and the Master of the Rolls held, on the authority of *Pease* v. *Jackson* (3), that the legal estate vested in the *Marsons* and not in the *General Credit Company*. In *Robinson* v. *Trevor* (4) (a case which came under the statute of 6 & 7 Will. 4, c. 32) there was a first mortgage to a building society, a second mortgage to the plaintiff, and then the appellants—the trustees of a lodge of Odd Fellows—at the request of the mortgagor, paid off the building society and received the title deeds and the mortgage deed with an indorsed receipt. The Court of Appeal, following the decision in *Pease* v.

(1) 31 L. T. (N.S.) 670.
(2) 14 Ch. D. 140–147.
(3) Law Rep. 3 Ch. 576.
(4) 12 Q. B. D. 423.

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Jackson (1), held that the legal estate vested in the appellants, because when they paid off the building society they had no notice of the second mortgage. I observe that two of the learned Judges abstained from giving any opinion, merely stating that the case was governed by the decision in *Pease* v. *Jackson*. I cannot understand what the question of notice has to do with it. Any one who takes a transfer of a first mortgage gets a perfectly good security whether he has notice of subsequent mortgages or not. The equity in these cases seems to be the right to a transfer. How could that equity be affected by knowledge that there were subsequent incumbrances? In this case it is suggested that the Plaintiff who had no knowledge must be treated as having constructive notice of the Defendant *Cochrane's* ignorance of the first mortgage, because *Cochrane* was in possession of the house he had bought. That seems to me to be a curious attempt to extend the doctrine of constructive notice. A purchaser buying property which is in the actual possession of some person other than the vendor may have constructive notice of the title under which that person holds. But how can that apply to the transferee of a prior mortgage? How can the constructive notice be of any thing except the actual title of the occupant—that is in this case that he was owner subject to a mortgage? How can the transferee be taken to know that the person in possession was ignorant of that mortgage? and, finally, what can it matter if he did know? To these questions I have not received, nor have I been able to find any satisfactory answer. I therefore hold that the Plaintiff *Sangster* had no notice that the Defendant *Cochrane* was ignorant of the mortgage to the building society, and that if he had known that fact it would not have altered his position. Against my own opinion, and believing myself to be bound by the decisions which I have mentioned, I must hold that the effect of the receipt was to vest the legal estate in the Plaintiff *Sangster*, and that his mortgage to the extent of the money paid to the building society and the interest thereon is prior to the Defendant's claim.

Solicitors: *Oldacres, Dear, & Armstrong; Talfourd Hughes.*

(1) Law Rep. 3 Ch. 576.

T. F. M.

STUDDS *v.* WATSON.

NORTH, J.

1884

Nov. 19, 20.

[1883 S. 3119.]

Vendor and Purchaser—Statute of Frauds, s. 4—Two Documents referring to same parol Contract of Sale—Sufficient Memorandum—Specific Performance.

Two or more documents which do not refer to each other, but do refer to the same parol contract, and which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the *Statute of Frauds*.

On the 22nd of September, 1882, the Defendant verbally agreed with the Plaintiff to sell him her share in certain property for £200, and signed and gave to him the following receipt: "Sept. 22nd, 1882. Received of *J. Studds* one pound of my share in the *Barrett's Grove* property the sum of two hundred pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th of March, 1883, the Defendant wrote to Plaintiff: "Mr. *Studds*,—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882) not any longer binding":—

Held, that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the *Statute of Frauds*, sect. 4:

Held, also, that even if the word "balance" was not sufficient to connect the two documents, yet that as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, and together constituted a good memorandum within the statute.

AT the time of the agreement after-mentioned the Plaintiff, *J. Studds*, was tenant of certain leasehold property, known as Nos. 3 and 4, *Barrett's Grove, Stoke Newington*, under a lease granted in 1873 by a predecessor in title of the Defendant, *E. P. Watson*, under whose will the Defendant was entitled to an undivided sixth share in the property.

On the 22nd of September, 1882, the Plaintiff and Defendant verbally agreed for the sale by the Defendant to the Plaintiff of her share in the property for £200, and the Defendant wrote and signed the following receipt:—

"September 22nd, 1882. Received of *J. Studds* one pound of my share in the *Barrett's Grove* property the sum of two hundred pounds.

"*Esther Peachey Watson.*"

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No time was fixed for payment of the balance of the purchase-money, or for the completion of the purchase, and no abstract of title was asked for or sent to the Plaintiff; but on the 19th of March, 1883, the following letter was written by a Mr. *Malan* on behalf of the Defendant to the Plaintiff:—

"Mr. *Studds*,

"Sir,

"If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant, I shall consider the agreement (made 22nd of Sept. 1882) not any longer binding."

This letter was not complied with, but on the 5th of April, 1883, the Plaintiff tendered the Defendant the balance of the purchase-money and a conveyance of the property for her execution, but this was declined. On the 3rd of July, 1883, the Plaintiff commenced this action claiming specific performance of the contract. There were several defences, but the only one calling for a report was that grounded on the 4th section of the *Statute of Frauds*. This was the trial of the action.

Barber, Q.C., and *Hall Hall*, for the Plaintiff.

W. W. Karslake, Q.C., and *Maidlow*, for the Defendant:—

The receipt standing by itself is an insufficient memorandum or agreement for the sale or purchase of the Defendant's property. There is nothing on the face of it to shew who the purchaser is. If that is so, then the Plaintiff cannot make any use of the letter of the 19th of March. That also, taken by itself, is an insufficient memorandum of agreement. It does not state who the purchaser is, or the amount of the purchase-money. They cannot be taken together because one document does not refer to the other. No doubt, the letter refers to an agreement, but that is not the receipt, for a receipt is not an agreement. The agreement referred to is the parol agreement made when the receipt was given, but under the circumstances that cannot be incorporated: *Shardlow* v. *Cotterell* (1); *Long* v. *Millar* (2).

(1) 18 Ch. D. 280; 20 Ch. D. 90. (2) 4 C. P. D. 450.

NORTH, J.:—

This is an action for specific performance of a parol agreement to sell an interest in land, and the question arises how far it is evidenced by a receipt and a letter. The evidence is clear that a parol contract for the sale of the property in question was come to between the Plaintiff and Defendant on the 22nd of September, 1882, and that it was an open contract, no time being fixed for completion or payment of the purchase-money, and therefore a reasonable time for completion would be inferred. The principal defence is that there is no sufficient memorandum in writing within the 4th section of the *Statute of Frauds*. Two documents are relied on for that purpose. One is a receipt, and the other is a letter written on behalf of the Defendant by a Mr. *Malan*. Now, the receipt by itself is clearly an insufficient memorandum. It is signed by the Defendant, and runs thus: "Sept. 22nd, 1882. Received of *J. Studds* one pound of my share in the *Barrett's Grove* property the sum of two hundred pounds." It is an informal document, and somewhat difficult to understand. I read it as meaning "received £1, part of the sum of £200, my share in the *Barrett's Grove* property." Then the letter of the 19th of March, 1883, is as follows: "Mr. *Studds*,—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant, I shall consider the agreement (made 22nd of September, 1882) not any longer binding." Now this letter refers to the agreement made on the previous 22nd of September. Mr. *Maidlow* says that the receipt is not here referred to, because an agreement is referred to, and that the receipt is not an agreement. It seems to me that the agreement referred to is the parol agreement which was made on that day for the sale of the property, of which the receipt forms part. But it is said that the letter does not contain the name of the purchaser. It is addressed to Mr. *Studds*, and it treats him as the purchaser, and in fact he is the purchaser. I do not dwell on this point, however, because I think it is concluded by authority. In *Shardlow* v. *Cotterell* (1) it was held that a receipt, memorandum, and conditions of sale contained a sufficiently definite description of the property sold to enable the Court to receive parol evidence of

(1) 18 Ch. D. 280; 20 Ch. D. 90.

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what the property consisted. In the present case, when I look at the statement to the person who is called upon to pay, it seems to me that he is sufficiently indicated as the purchaser when he is called upon to pay the balance of the purchase-money. The reference to the purchaser is not conclusive, for it might have been shewn *aliunde* that *J. Studds* was not the purchaser, but that is not the case here. But then it is said that the letter does not state what the purchase-money is, and that it might have been £200 or any other sum. But the receipt does, for it is equivalent to £1 on account of £200 as I have said before. Then is there a sufficient connection between the two documents to enable the Court to read them together? I think there is, and I will take *Long* v. *Millar* (1) as an illustration of the rule that any documents, one of which refers to the other, can be read together. In that case the word "purchase" was held equivalent to "agreement to purchase," so as to connect a receipt with an agreement. Another illustration is the case of *Cave* v. *Hastings* (2), where the plaintiff signed a memorandum setting forth the terms of a contract by which he agreed to let a carriage to the defendant for the period of a year, and the defendant in a subsequent letter to the plaintiff referred to "our arrangement for the hire of your carriage," and it was held that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the *Statute of Frauds*. In my opinion, there is in this letter ample to connect it with the receipt by the use of the word "balance." What is a "balance" of purchase-money. It is the sum remaining unpaid, generally the larger portion, of the purchase-money: in the present case the difference between the £1 and the £200. I find, therefore, that there is a sufficient connection between the documents, and that the receipt supplies what is wanting in the letter. But there is a further point, namely, that even assuming the word "balance" not to be sufficient to connect the two documents, yet there is a parol agreement proved to which both these documents refer. All the terms of this parol agreement are found in one or other of the two documents, and are in themselves sufficient to constitute a good

(1) 4 C. P. D. 450. (2) 7 Q. B. D. 125.

memorandum of the agreement within the statute. Moreover, it has been decided that a parol contract may be evidenced by an affidavit made at a different time. And supposing that there were two affidavits evidencing a parol contract, I do not think that it would be necessary for those affidavits to refer to one another. It would, I think, be sufficient if both referred to the same parol contract. That being so, I think it is not necessary in this case that these two documents should refer the one to the other. In my opinion, therefore, the *Statute of Frauds* is no defence to this action. [His Lordship then dealt with the letter as a notice to complete, and held that under the circumstances it was an unreasonable notice, that there had been no unreasonable delay on the part of the Plaintiff, and gave judgment for specific performance accordingly.]

Solicitor for Plaintiff: *G. Hall Hall.*
Solicitors for Defendant: *Stocken & Jupp.*

H. L. F.

BREWER *v.* BROWN.

[1883 B. 6631.]

Vendor and Purchaser—Condition of Sale—Compensation—Misrepresentation—Rescission of Contract.

The particulars of sale of a freehold property described the garden as "inclosed by a rustic wall with tradesmen's side entrance." The wall did not form part of the property, and the tradesmen's side entrance was used on sufferance. This was known to the vendor, but not disclosed to the purchaser. The conditions of sale provided that mistakes or errors in the description of particulars should not annul the sale, but that compensation should be given:—

Held, that it was not a case for compensation, and that the purchaser was entitled to have the contract rescinded.

IN April, 1880, the Plaintiff and Defendant entered into a written contract for the sale by the Defendant to the Plaintiff of a freehold villa and garden known as *Frith Cottage, Ham Frith Road, West Ham, Essex,* at the price of £1300.

The contract was dated the 17th of April, 1880, and was in-

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dorsed upon and referred to printed particulars and conditions of sale, which had been prepared for a sale by public auction. The particulars contained the following statement:—"The garden is tastefully laid out and inclosed by a rustic wall, with tradesmen's side entrance." The 11th condition of sale provided that no mistake in the description of the premises or other error whatsoever in the particulars (which particulars are however believed to be correct), shall annul the sale, but a compensation or equivalent shall be given. The wall formed the boundary of the property on its north and east sides, and on its north side the wall abutted upon a public road called *Atherton Road*, into which the "tradesmen's side entrance" opened. This tradesmen's entrance did not exist when the Plaintiff purchased the property; he opened it afterwards. At the date of the contract there was let into the northern face of the north wall a stone tablet bearing the name *Frith Cottage*.

The Plaintiff entered into the contract with the intention, as was well known to the Defendant, of building cottages upon the northern part of the garden to front upon and have direct access to *Atherton Road*.

Upon signing the contract the Plaintiff paid to the Defendant a deposit of £200, and by the terms of the contract the payment of the balance of the purchase-money was spread over five years, with interest in the meantime at £5 per cent. Possession was given to the Plaintiff in May, 1880, but no conveyance was executed. In January, 1883, the Plaintiff gave up possession of the property with a view to building, and did not resume possession. In October, 1883, he discovered for the first time that the north wall and the site of it did not belong to the Defendant but to the adjoining owner, and thereupon he commenced this action.

The Plaintiff, after setting out the above facts in his statement of claim, alleged that he was induced by the above statement in the particulars to believe that the north wall formed part of the property, and entered into the contract in such belief, and claimed rescission of the contract, the return of his deposit with interest, and other consequential relief.

The Defendant by his statement of defence traversed the material allegations in the statement of claim, alleged that the

Plaintiff was informed before he purchased that there was a doubt about the north wall, and also relied on the 11th condition of sale. Issue was joined, and this was the trial of the action.

Barber, Q.C., *Woollett*, and *P. S. Gregory*, for the Plaintiff:—

The natural inference on reading in the particulars the statement about the wall, is that the wall forms part of the property to be sold, and the name on the stone let into the wall supports this view. If the vendor knew, and we say he did, that this wall was not his, he should have clearly stated the difference between the apparent and real boundaries. There has been a material misrepresentation which entitles the Plaintiff to rescission of the contract and return of his deposit. The principle of *Denny* v. *Hancock* (1) applies, and it is not a case for compensation.

Warmington, Q.C., and *Mirams*, for the Defendant:—

First, assuming that the words "tradesmen's side entrance" are not in the statement that is relied on, the words "inclosed by a rustic wall" merely indicate that the garden is bounded by the wall, and do not necessarily indicate that the wall is part of the property and is included in the sale. Then the "tradesmen's side entrance" does exist, and will exist so long as the wall exists, and there is no misrepresentation in that. Therefore the entire phrase as here used does not necessarily convey a false impression. Next, we say the purchaser was informed before he signed the contract that there was a doubt about the wall, and that it was not included. If that is so, then this phrase is not misleading, but is merely descriptive of the boundary of the property. Then the title-deeds give the measurements, which do not include the wall, and contain no reference to the wall, and they were inspected by the Plaintiff, who is a solicitor, before he agreed to buy. Lastly, the Plaintiff's own evidence shews that the difference in value without the wall is only about £100, and that is not so substantial as to entitle the Plaintiff to rescission, if this statement was an innocent mistake, but is a fit subject for compensation.

Barber, in reply.

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This action is brought by the Plaintiff for the purpose of having a contract entered into by him on the 17th of April, 1880, rescinded with consequential relief. That was a contract by which the Plaintiff agreed to purchase certain premises from the Defendant, and the ground upon which it is sought to have it rescinded is that the Defendant did not do that which was incumbent upon him, namely, make such a disclosure as entitles him to hold the Plaintiff to the contract. Possession was given soon after the contract was made, and £200 deposit was paid, but the rest of the purchase-money has not been paid, inasmuch as completion was postponed for five years, and that time has not yet expired. The contract was for the purchase of a certain house described as "a charming freehold detached villa residence, known as *Frith Cottage, Ham Frith Road, West Ham,*" and so on. There was no plan annexed or referred to in the particulars, but it is proved that before the contract was made the Plaintiff had been to inspect the property and to examine it, and a plan has been put in which was made by a surveyor for the Plaintiff, and it is admitted by the Defendant to be correct. That plan shews that the property consists of a long, narrow piece of land with a house standing upon it, the front of which—I call it the front because that is the way the front of the house looks—is towards the *Ham Frith Road*, and the frontage in that direction is about fifty feet. But it has a side frontage of 181 feet to the *Atherton Road*. Any person knowing the property, as the Plaintiff and the Defendant did, and examining it carefully, would see that what was offered for sale was a property with a frontage towards two roads, the *Ham Frith Road* and the *Atherton Road*, and he would see that the long frontage was towards the *Atherton Road* and not the *Ham Frith Road*, though perhaps it is not so correct to call that a frontage as the other. Then he would also see that there was a wall forming a division between the *Atherton Road* and the land itself, and he would see that there was an opening in the side of the wall, which is called on the plan "side-entrance gate," and in the particulars, "tradesmen's side entrance." And he also would see that there was in the *Atherton Road*, on the

north face of the wall forming the side of the premises, a stone with the name of the house, "*Frith Cottage*," inscribed upon it.

Under those circumstances, anyone looking at that property would come to the conclusion that the house abutted on two roads, and that it had a frontage to both of those roads. As a matter of fact it now turns out, that at that time the wall and the site of it which lies between the garden inside and *Atherton Road* outside, was not the Defendant's at all, and an admission has been made in the action to that effect, that is to say, that between the garden of the property and *Atherton Road* a wall interposed belonging to somebody else. That was not found out by the Plaintiff, according to his case, until shortly before this action was brought, and there is no evidence whatever to the contrary on that point, except that which I shall examine by and by, viz., the statement by the Defendant that the Plaintiff was so informed before he made any contract at all.

Now the Plaintiff says that when he bought the property he believed that that wall was part of the property, and I must say that the situation and position of the property are such as to render that statement an extremely probable one. In addition to that, the particulars contained this statement, "the garden is tastefully laid out and inclosed by a rustic wall, with a tradesmen's side entrance." That has reference to this particular wall, I do not know whether it is confined to that. It may include the two walls at the end also, but it is a clear reference to the wall between the garden and *Atherton Road* containing a side entrance. Looking at that statement, all the circumstances would lead me to think, if I had been purchasing the property, and I believe the Plaintiff when he says they led him so to think, that that wall was part of the property that was being purchased. If that wall was not the Defendant's there was no tradesmen's entrance to the house at all, unless some separate right existed. Then in addition to that, there is not only the side entrance, but fixed on the outer side of the wall there is a stone mentioning the name of the villa, which is a strong piece of evidence that any person looking at the property would come to the conclusion that the wall upon which the name appeared was part of the property. Now the next question is, whether that statement is

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material or not. In my opinion it is material. Whether this frontage of 181 feet was or was not a frontage, whether it was cut off from the road by a wall or not, would be very important ingredients in the mind of any person buying that property. There is evidence that at all events the value of the property depends on whether the wall is or not included. It is obvious that the question whether this wall belongs to the owner of the road or the owner of the garden was a very material one. Then further it is said that the Plaintiff wanted the property to build upon, and that was particularly mentioned at an interview which took place between the Plaintiff and the Defendant at which no one else was present. With respect to that I have only the conflicting statements of the two, and so far as those statements go by themselves, there is nothing to shew which is correct. But it seems to me that if the Plaintiff bought the property in the view that that wall was part of the property, when in fact it was not, the Plaintiff so purchasing got something totally different from what he contemplated buying, viz., a piece of land with a long frontage to a road, which in point of fact did not front a road at all. Now with respect to that, in my opinion, looking at the situation of the property, looking at the inference which any one going to see it would draw on seeing it and the tradesmen's side entrance, it seems to me that it is a case in which it was the vendor's duty to inform a person buying from him what the real state of things was, and, whatever his duty might have been in other respects, it was all the more incumbent on him when he chose to put that statement in the particulars, "the garden is tastefully laid out and inclosed by a rustic wall, with a tradesmen's side entrance." That is put forward as a recommendation of the property. In my opinion it was the vendor's duty to take care that he did state, what is now clearly a fact, that that wall was not a part of the property, and that the tradesmen's entrance was only used on sufferance. Now the case of *Denny* v. *Hancock* (1) was referred to in the course of the arguments, and although the facts in that case were somewhat different to these, I think the *ratio decidendi* of it governs this case; for, as I have said, any one looking at this property might have come to the

(1) Law Rep. 6 Ch. 1.

conclusion that the wall was a part of the property, and that the purchaser would get it. Taking the same view as the learned Judges did in that case, in my opinion it was incumbent on the person describing this property to take care that the persons who inspected it would know that that wall was not a thing to be sold. But then it is said that that information was given, and it is said (and I agree in this remark) that if in point of fact that information was given to the purchaser before he entered into the contract it does not matter whether it was contained in the particulars or not, or whether the information was given in some other way. It is necessary, therefore, to examine the evidence to see whether that information was given to the purchaser as alleged before the contract was entered into. With reference to this, the onus of proof is on the Defendant.

[His Lordship then dealt with the Defendant's evidence on this point, and came to the conclusion that the story told by the Plaintiff was the true one, and that the Defendant's version could not be accepted as correct, and continued:—]

Then there is one further point. One of the conditions of sale is to this effect: "no mistake in the description of the premises or other error whatsoever in the particulars (which particulars however are believed to be correct) shall annul the sale, but a compensation or equivalent shall be given," and it is suggested that if I decide against the Defendant I ought not to rescind this contract, but ought to give the Plaintiff compensation. I will not do that for the reason I have already indicated, viz., that it seems to me the Plaintiff believed he was buying this piece of land with the wall and with a frontage to the side road, and he contemplated the possibility of building on it. At any rate it is a piece of land that might be built upon, and what he would have if I gave him compensation would be a piece of land without a lateral frontage, and without the possibility of being built upon. Under these circumstances I do not think this is a case in which the Defendant is entitled to say there should be a compensation given to the Plaintiff, and therefore I do not give compensation. I do not omit to notice that compensation can only be insisted on where there is a mistake in the description of the premises or

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error in the particulars. I do not think that accurately describes what took place in this case. Here the omission is to state in the particulars something that was essential the vendor should tell the purchaser when entering into the contract of sale.

Under these circumstances the Plaintiff has succeeded, and I rescind the contract.

Solicitor for Plaintiff: *W. Brewer.*
Solicitor for Defendant: *S. G. Hare.*

H. L. F.

BATTEN *v.* WEDGWOOD COAL AND IRON COMPANY

PEARSON, J.

1884

Nov. 24, 25.

[1875 B. 257.]

Administration of Assets—Action by Debenture-holders—Insufficient Estate—Costs—Priority—Receiver and Manager—Trustees—Solicitor—Lien—Practice—Costs—Set-off—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-s.* 21.

In a suit instituted by a debenture-holder of a company, on behalf of himself and the other debenture-holders, against the company and the trustees of a deed, by which leasehold collieries and plant of the company were assigned to trustees to secure the payment of the debentures, to enforce the security, a receiver and manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, the Plaintiff having the conduct of the sale, and the purchase-money was paid into Court. The fund was insufficient. The original Plaintiff became bankrupt in the course of the proceedings, and another debenture-holder was substituted for him as Plaintiff. On the further consideration of the suit:—

Held, that the costs and other expenses must be paid out of the fund in the following order:—

(1.) The Plaintiff's costs of the realization of the property, including the costs of an abortive attempt to sell.

(2.) The balance due to the receiver and manager (including his remuneration) and his costs of the suit.

(3.) The costs, charges, and expenses of the trustees of the deed.

(4.) The two Plaintiffs' costs of the suit, *pari passu*.

When the second Plaintiff was substituted for the first, an order was made that the solicitors of the first Plaintiff should, without prejudice to their lien (if any) deliver up to the solicitor of the second Plaintiff all documents in their possession relating to the conduct and prosecution of the suit:—

Held, that the solicitors of the first Plaintiff had no lien on the documents which could entitle them to priority in respect of their costs.

Two summonses taken out by the Plaintiff were heard with the further consideration of the suit, and were dismissed with costs.

Held, that these costs must be set off against the costs which the Plaintiff was entitled to receive out of the fund.

Under sub-sect. 21 of rule 27 of Order LXV. of the Rules of the Supreme Court, 1883, costs which a party is ordered to pay personally may be set off against costs which he is entitled to receive out of a fund in Court.

THIS suit was commenced in July, 1875, in the Court of Chancery by *David Brown*, on behalf of himself and all other the holders of the first mortgage debentures issued by the Defendant

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company, as Plaintiff, against the company and the trustees of a deed, by which the company assigned their leasehold collieries and other property to trustees as a security for the payment of the debentures, to enforce the security. On the 2nd of August, 1875, Mr. *F. B. Smart* was appointed receiver and manager of the properties comprised in the trust deed, to receive the rents and profits and income of the properties, and to manage the same. Under this order he continued to work the collieries until the year 1883, when they were sold. In November, 1875, an order was made to wind up the company, and *Smart* was appointed liquidator, and was authorized to appear for the company in the suit. In December, 1875, a decree was made for accounts and inquiries, and for the sale of the property comprised in the debenture trust deed.

In 1881 the original Plaintiff, *Brown*, was adjudicated a bankrupt, and on the 21st of March, 1882, Mrs. *Batten*, another debenture-holder, was, on her application, substituted for him as Plaintiff in the action. Messrs. *Mercer & Mercer* acted as solicitors for *Brown*; Mr. *J. V. Musgrave* acted as solicitor for Mrs. *Batten*. For some years no purchaser could be found for the collieries. In December, 1882, the collieries were put up for sale by public auction under the direction of the Court, but no sale was effected. The property was then advertised for sale by private contract, but without success. On the 23rd of July, 1883, an order was made that the plant should be broken up and sold by auction. Soon afterwards Mr. *R. Attenborough* offered £1600 for the purchase of the collieries and the plant. This offer was accepted, and was sanctioned by the Court on the 21st of August, 1883. On the 28th of August, 1883, the receiver and manager gave up possession of the property. The sale was carried out by the Plaintiff's solicitor, and the purchase-money was paid into Court in the suit, and formed the only asset for payment of all costs and expenses, and for division among the debenture-holders. The receiver and manager passed his accounts in Chambers, and they shewed a balance of over £8000 due to him, above the moneys which he had received in working the collieries. The balance consisted partly of costs and expenses, and partly of remuneration for his services.

The suit now came on for further consideration, and the main question for decision related to the priorities of the different claims on the fund, which was insufficient to meet them all. Three summonses, the hearing of which had been adjourned into Court, came on for hearing with the further consideration. Two of these summonses, one of them being to vary the chief clerk's certificate, had been taken out by the Plaintiff, and it is unnecessary to refer to them, except for the purpose of stating that they were both dismissed with costs.

A third summons was taken out by Messrs. *Mercer & Mercer*, the solicitors of the original Plaintiff, asking that the taxed amount of their bill of costs as solicitors of the original Plaintiff *Brown* might be paid out of the fund in priority to any other person. On the 20th of April, 1882, on the application of the Plaintiff Mrs. *Batten*, an order was made that *Mercer & Mercer*, as solicitors for *Brown*, should deliver over to Mr. *Musgrave*, the solicitor for Mrs. *Batten*, the substituted Plaintiff, all papers and documents relating to the conduct and prosecution of the action, such delivery to be subject and without prejudice to the lien of *Mercer & Mercer* (if any) upon such papers and documents. And it was referred to the Taxing Master to tax the costs of the late Plaintiff *Brown*. These costs were afterwards taxed at £178 9*s.* 10*d.*, and this was the amount in respect of which *Mercer & Mercer* claimed priority.

Cozens-Hardy, Q.C., and *Heath*, for the Plaintiff:—

The only question on the further consideration of the action is as to the order of priority in which the costs and expenses are to be paid. The Plaintiff is entitled, in respect of the costs of the realization of the property, to priority over everything else. By the Plaintiff's action the fund has been made available for everyone; the costs of realization ought, therefore, to come first. Subject to any right of the trustees of the debenture deed for their costs, charges and expenses, the other costs of the Plaintiffs should come next. The costs of the present Plaintiff and of the original Plaintiff must be paid rateably *inter se;* the original Plaintiff is not entitled to any priority.

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[PEARSON, J., referred to *In re Dronfield Silkstone Coal Company* (1).]

That was a winding-up case; there was no contest between an original Plaintiff and a substituted Plaintiff.

Levett (*Higgins*, Q.C., with him), for Messrs. *Mercer & Mercer*, the solicitors of the original Plaintiff:—

We had a lien for our costs on the papers which we were ordered to deliver up to the solicitor of the present Plaintiff. We could not, if we had chosen to discharge ourselves, embarrass the proceedings in the action by retaining the papers, but, as we were discharged, we are entitled to be paid our costs before giving up the papers: *Pilcher* v. *Arden* (2). We gave up the papers without prejudice to our lien.

[*Cozens-Hardy*, referred to *Boughton* v. *Boughton* (3).]

PEARSON, J.:—I do not intend to create again a lien which seems to have been abolished by common sense and the practice of the Court. I dismiss the summons.

Cookson, Q.C., and *E. Ford*, for the Receiver and Manager:—

The receiver and manager is entitled to priority in respect of his remuneration, and costs and expenses. The fund is the fruit of his labour. He kept the collieries together for the purpose of realization; but for that there would have been nothing for any one. No doubt the costs of realization come before the costs of suit, but the costs which the receiver claims are really costs of realization.

[PEARSON, J.:—By costs of realization I understand the costs of the actual sale.]

The price obtained was really due to the plant; the colliery itself fetched nothing. At any rate the costs of realization do not include the costs of the particulars and conditions of sale. The receiver ought to be placed in the same position as a receiver under a liquidation petition in bankruptcy, who is entitled to be

(1) 23 Ch. D. 511.
(2) 7 Ch. D. 318.
(3) 23 Ch. D. 169.

paid his costs out of the estate in priority to the costs of the debtor's solicitor: *Ex parte Royle* (1). In *Morison* v. *Morison* (2) it was held that a consignee of West Indian estates had a lien on the *corpus* of trust estates, in priority to the costs of an administration suit, and to a mortgage of one of the estates, for advances made by him with the sanction of the Court.

Giffard, Q.C., and *H. Fellows*, for the trustees of the debenture-deed, and their solicitors, Messrs. *Stibbard, Gibson, & Co.*:—

Messrs. *Stibbard, Gibson & Co.* were entitled to a lien on the title-deeds, which were in their hands, for costs due to them before the commencement of the action, and they gave up the deeds on the terms that their lien should attach to the purchase-money. These costs, therefore, ought to be paid in priority to everything except the costs of realization.

The rule that the costs of realization have priority is applied in an administration action, because those costs are costs of the executor. In *Dodds* v. *Tuke* (3) it was held that the trustees of a creditors' deed were entitled to have their costs, charges, and expenses out of the trust fund, in priority to the costs of all other parties to an action by *cestuis que trust* under the deed for accounts from the trustees, and to ascertain the rights of the persons interested under the deed.

[PEARSON, J.:—The receiver is not a *cestui que trust*; as between the trustees and the *cestuis que trust* the trustees are the owners of the estate. The receiver acts for the trustees as much as for the *cestuis que trust*. He is an officer of the Court, and has done his work for the benefit of everyone.]

The trustees have a charge on the fund for their costs, charges, and expenses, and until they have been paid the fund cannot be ascertained. They have a lien on the *corpus* of the trust fund as against everyone else.

[PEARSON, J.:—In *Courand* v. *Hanmer* (4), an adverse application against a receiver having been made by a party to the cause and refused with costs, and the applicant being unable to pay the costs, it was held that the receiver was entitled to his

(1) Law Rep. 20 Eq. 780.
(2) 7 D. M. & G. 214, 226.
(3) 25 Ch. D. 617.
(4) 9 Beav. 3.

PEARSON, J. costs, as between solicitor and client, out of a fund belonging to incumbrancers, who objected to the costs being paid out of the fund.]

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The receiver is the agent of the beneficiaries, not of the trustees. There is no precedent to be found in an ordinary administration suit for the severance of the costs of realization of the estate from the other costs of the executor; the Plaintiff gets those costs in priority because they are costs of the executor. *Morison* v. *Morison* (1) is entirely in our favour; in that case the consignee got his costs because he stood in the place of the trustees. The receiver in the present case had nothing to do with the realization of the fund which is in Court.

[PEARSON, J.:—Suppose there had been no suit, and the trustees had appointed a manager of the business, could they have refused to pay him his salary?]

Perhaps not; but they did not appoint the receiver.

[*Cookson*, Q.C.:—They consented to the appointment.]

They only left it to the Court. *Ex parte Royle* (2) was the case of a receiver appointed under a liquidation petition, but even there it was held that the receiver's costs came after the costs of realizing the property. In *In re Massey* (3) it was held that the official liquidator of a company in liquidation was not entitled to receive anything out of the assets by way of remuneration, until the costs of the winding-up petition and all the costs of the winding-up had been paid in full. The same principle applies to a receiver. The receiver's claim, if allowed, will exhaust the whole fund.

[PEARSON, J.:—Is it the rule that a receiver appointed in an administration suit cannot get any remuneration until all the costs of the action have been paid? It is a very common thing for a receiver in such a suit to pass his accounts and obtain his discharge, and for the suit to be wound up afterwards.]

That is when the estate is sufficient. Has a receiver ever been allowed to interfere with the lien of trustees for their costs? Nothing but the costs of realization (in the strictest sense) of the property can have priority over the trustees' costs. The receiver

(1) 7 D. M. & G. 214. (2) Law Rep. 20 Eq. 780.
(3) Law Rep. 9 Eq. 367.

was appointed to receive income; his remuneration ought to come out of income not out of capital; he is claiming now to be paid out of capital.

Warmington, Q.C., and *Boome*, for the purchaser:—

The purchaser is entitled to have a sum which the landlords have agreed to accept for giving their license to assign the lease satisfied out of the purchase-money in priority to all the other claims.

[This claim was not contested.]

Levett (*Higgins*, Q.C., with him), for Messrs. *Mercer & Mercer*. Unless a receiver is specially authorized by the Court to make advances, he is not entitled to retain any advances which he may have made out of the assets which he receives. He is not entitled to incur liabilities on the credit of capital, and then to retain his remuneration out of income. This is, in effect, advancing money without the previous authority of the Court. At any rate, there should be an inquiry whether the expenditure was for the benefit of the parties interested: *Tempest* v. *Ord* (1).

[PEARSON, J.:—This point does not really arise.]

I admit that the receiver is entitled to priority over my claim as regards income.

PEARSON, J.:—

I have been exceedingly surprised at some of the arguments which have been addressed to me, and also to find that there is so very little authority directly in point. To my mind, however, that arises from the fact that the principles on which the Court is in the habit of acting have never been challenged, and that the rule has always been to pay the receiver before distributing the estate. The receiver was discharged on passing his accounts, and he was paid the remuneration at 5 per cent. to which he was entitled, and all his costs, and, if the argument was sound that the payment of the remuneration of the receiver is dependent on the sufficiency of the estate to bear all the costs, it is quite plain that a receiver would never be discharged until it had been

(1) 2 Mer. 55.

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established to the satisfaction of the Court that there would be enough to pay all the costs. No one, however, has ever heard of such a thing. The present case is a very unfortunate one, for, whatever order I may make, the debenture-holders will get nothing. The simple question is this. The company's collieries were assigned to trustees, on trust to secure the payment of some debentures issued by the company. An action was brought by one of the debenture-holders, on behalf of himself and the others, against the company and the trustees, for the execution of the trusts of the deed. No complaint was made of the trustees, but of course it was necessary to make them Defendants. In this action a receiver and manager of the collieries was appointed. Unfortunately the action went on for nine years before the property was realized. No complaint was made of the management by the receiver, and it was so far successful, that the receipts from the business increased. But, on the winding-up of the action, it turns out that there is not sufficient to pay the costs of management and the remuneration of the receiver. There has been and there is no complaint made of the receiver's accounts. The only complaint is, that owing to some misapprehension, in which all parties seem to have shared, his accounts have been kept irregularly, *i.e.*, his accounts as receiver in the action and as liquidator of the company have been mixed up together. There is no other complaint made. It is said that the receiver was entitled to be paid his remuneration *de anno in annum*. In fact there is no possibility of doing that now, and whatever the receiver has done has been sanctioned by the Chief Clerk, so that there is no need to direct any inquiry. I have this simple question to decide: Ought the receiver to be paid before it can be said that there is anything to distribute in the payment of costs or anything else? In my opinion, that is the receiver's position. He is the officer of the Court, and the Court is bound to see that he is paid, just as if the trustees had employed a manager, they would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it. I think the Court is bound to see that the receiver is paid. I think this was the view taken by Lord *Langdale*, M.R., in *Courand* v. *Hanmer* (1). The mortgagor of a benefice, a defendant in the suit, had presented a petition asking to charge

(1) 9 Beav. 3.

the receiver on account of alleged defaults, and this petition had been dismissed with costs. The mortgagor was unable to pay the costs, and Lord *Langdale* held, notwithstanding the opposition of some of the incumbrancers, that the receiver must be indemnified and have his costs as between solicitor and client out of the fund.

I am of opinion, therefore, that the receiver in the present case must be indemnified, so far as the assets under the control of the Court enable this to be done. With regard to the costs of the realization of the assets, I think Mr. *Cozens-Hardy* is right in contending that these costs stand in a different position from any of the other claims. The property must be realized by someone in order that it may be distributed, and whoever has realized it and brought the proceeds under the control of the Court, has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled. These costs must therefore be paid in priority to the receiver. The purchaser is entitled to be paid the amount of his claim out of the purchase-money before everyone else. Then the sum due to Messrs. *Stibbard, Gibson & Co.* for costs incurred before the action must be paid. This was a charge which existed prior to the creation of the trusts of the debenture deed. The other claims will be paid in the following order: (1) The costs of the realization of the property; (2) the balance due to the receiver; (3) the costs, charges, and expenses of the trustees of the deed; (4) the costs of the two Plaintiffs *pari passu;* (5) the debenture-holders.

Cookson, Q.C.:—The costs of realization ought not to include the costs of the abortive attempt to sell; that attempt did not produce the fund. The principle is that the man who has actually produced the fund for distribution is to have his costs of producing it paid in priority.

PEARSON, J.:—The abortive sale appears to me to have been one step towards the realization of the property; I cannot distinguish the costs of it from the other costs of realization.

Cookson, Q.C.:—The costs which the Plaintiff has been ordered to pay of her two dismissed summonses ought to be set off against the costs which she is to receive out of the fund in Court. Power

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to direct this set-off is given by sub-sect. 21 of rule 27 of Order LXV. (1).

Cozens-Hardy, Q.C. :—That rule applies only when a party who is ordered to pay costs personally is entitled to receive costs from another party; it does not apply when a party, who is entitled to receive costs out of a fund, is ordered personally to pay costs to another party.

[PEARSON, J., referred to *Barker* v. *Hemming* (2).]

In order that the rule may apply, there must be a personal order on each side.

PEARSON, J. :—

I think this case comes completely within the words of the rule. It does not say that there may be a set-off of costs only "when a party entitled to receive costs is liable to pay costs to any other party from whom he is entitled to receive costs," but simply "when a party entitled to receive costs is liable to pay costs to any other party," and this seems to me to shew distinctly that, when a party who is liable to pay costs to any other party is entitled to receive costs, either from another party or out of a fund, there may be set-off in favour of the party to whom he is liable to pay costs. I am glad to see this rule; it seems to me only just and proper.

Solicitor for Plaintiff: *J. Vernon Musgrave.*
Solicitor for Receiver: *C. Harcourt.*
Solicitors for Trustees: *Stibbard, Gibson, & Co.*
Solicitors for original Plaintiff: *Mercer & Mercer.*
Solicitors for Purchaser: *J. & C. Attenborough.*

(1) Sub-sect. 21: "In any case in which, under the last preceding regulation, or any other rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered."

(2) 5 Q. B. D. 609.

W. L. C.

In re DOUGLAS.
WOOD *v.* DOUGLAS.

PEARSON, J.
1884
Dec. 1, 2, 16.

[1881 D. 413.]

Inheritance—Descent—Ex parte Paternâ or Ex parte Maternâ—Inheritance Act (3 & 4 *Will.* 4, *c.* 106), *s.* 2 [*Revised Ed. Statutes, vol. vii. p.* 320].

A testator who died in 1853 devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to the testator's only son and to his two daughters in equal shares, and to the survivors or survivor of them, with remainder on trust for the children of the son and the daughters respectively in fee, with an ultimate remainder unto and to the use of the testator's own right heirs. The son and both the daughters survived the testator, but they all died without issue. The son survived the daughters, and died intestate. He was the heir-at-law of his father, and also of his mother. The testator had also devised real estate of his own to the son, who elected to confirm the will:—

Held, that the equitable estate, which the son took under the will and by virtue of his election, merged in the legal estate which descended to him from his mother, and that the descent was regulated by the legal estate, and that, consequently, on his death intestate and without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, and not to his own heir.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate, and the execution of the trusts of the will of *Ralph Douglas*, who died in the year 1853. By his will, dated the 10th of July, 1851, the testator devised all his real estate to trustees, their heirs and assigns, in trust to pay the rents of his estate at *Fornside*, and of other real estate, unto his son *Joseph* and his two daughters *Dorcas* and *Margaret* in equal shares, and unto the survivor or survivors of them, the shares of his daughters to be for their separate use and benefit; and, in case his son *Joseph* or either of his daughters should die leaving a child or children him or her surviving, then in trust for such child or children in equal shares, and the heirs and assigns of such child or children respectively, but so that the issue of his said deceased son or daughters should take only such share as his, her, or their parent would have taken if living; and, in case his son *Joseph* and both of his said

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daughters should die without issue, then as to the whole of his said trust estate and premises to such uses and upon such trusts as the survivor of his son *Joseph* and his said daughters should by deed or will appoint. And in default of such appointment the testator gave and devised all his real estate unto and to the use of his own right heirs. And the testator also declared that, in case his son *Joseph*, or any child or children of his, should at any time after the testator's decease set up any right, title, or claim whatsoever to any part or share of the testator's estate at *Fornside* by reason of his or her being the heir of the testator's late wife deceased, or in case his son *Joseph* should refuse to execute a sufficient conveyance in law to the testator's said trustees and trustee of such part or share of the last-mentioned estate when thereunto requested, then the trust thereinbefore declared in favour of his son *Joseph* and his issue should thenceforth become null and void, and be for the exclusive benefit of the testator's daughters, their heirs and assigns. The son and both the daughters survived the testator. They all three died without issue. The son survived both his sisters. He did not exercise the power of appointment given to him.

The testator's deceased wife, *Dorcas Douglas*, was one of the two daughters of *Dorcas Armat*. The estate at *Fornside* had belonged to her, and on her death it descended to her daughters *Dorcas Douglas* and *Ann Brownrigg*, as her co-heiresses.

On the 3rd of March, 1882, an administration judgment was pronounced in the action, by which various inquiries were directed. The Chief Clerk by his certificate found that one undivided moiety of the *Fornside* estate was on the 2nd of February, 1814, conveyed to the testator in fee by *Ann Brownrigg* and her husband; that the testator's wife inherited the other undivided moiety as one of the co-heiresses of her mother, but that the testator, who survived his wife, treated this moiety as his own, and devised it by his will; and that the son *Joseph* never set up any right, title, or claim to this moiety by reason of his being or claiming to be the heir-at-law of the testator's wife. The certificate also found that the son *Joseph* was the heir-at-law of the testator at the time of his death, and that he was, at the time of the testator's death, as heir-at-law by representation of the

testator's wife's mother, entitled to that moiety of the *Fornside* estate which had devolved on the testator's wife. The Chief Clerk also found that *Joseph Douglas* had elected to treat the moiety which devolved on the testator's wife as being subject to the trusts and provisions of the testator's will concerning that moiety, and that he never executed any conveyance to the trustees of the will in respect of the *Fornside* estate, or any part thereof, and was never requested to execute such a conveyance.

Cozens-Hardy, Q.C., and *W. C. Druce*, for the heir of *Joseph Douglas*:—

Joseph had the legal estate in his mother's moiety of the *Fornside* estate as heir of his grandmother. But, by virtue of his father's will and his own election to take under the will, he took the equitable interest as *persona designata*, *i.e.*, as a purchaser. Therefore sect. 2 of the *Inheritance Act*, 3 & 4 Will. 4, c. 106, applies, and on his death the descent is to be traced from him, not from his grandmother. The old cases in which it was held that there was no equity as between the heirs *ex parte paternâ* and *ex parte maternâ* of the same person, have no application. The only question is, who was the last purchaser, and *Joseph* was clearly the last purchaser of the equitable interest. The mere fact that the legal estate is outstanding does not affect the question from whom is the descent to be traced. It might have done so before the *Inheritance Act*, but it does not now.

Maidlow, for the heir of Mrs. *Douglas* and the heir of Mrs. *Armat*:—

Joseph took the legal estate as heir to his mother. The grandmother was the last purchaser. He did not take under his father's will, for the father had no interest in the property. The father purported to devise the estate and put *Joseph* to his election. The effect of his election was to confirm the will only so far as was necessary to carry out its dispositions. The election did not affect his own reversion; it only operated to confirm the interests given to his sisters.

[PEARSON, J.:—Suppose he had conveyed the estate to the trustees of the will in accordance with the testator's direction?]

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If he had I should have no *locus standi;* but he did not.

[PEARSON, J.:—In order to effect the testator's intention there should have been a conveyance to the trustees.]

Only if *Joseph* was requested to execute a conveyance. He was not requested either by the trustees or by his sisters.

It is clear on the authorities that whatever equitable estate *Joseph* took under the will, and by virtue of his election, merged in the legal estate which descended to him from his mother, and the legal estate governs the descent: *Preston's* Conveyancing (1); *Doe* v. *Putt* (2); *Goodright* v. *Wells* (3); *Selby* v. *Alston* (4); *Langley* v. *Sneyd* (5); *Shelford's* Real Property Statutes (6).

Northmore Lawrence, for the trustees.

Cozens-Hardy, in reply:—

The cases cited relate to the question whether, when it is granted that a descent is to be traced from a particular person, the property is to go to his heir *ex parte paternâ* or to his heir *ex parte maternâ.* The question now is, from whom is the descent to be traced? The Act says that the descent is to be traced from the last purchaser, and in equity *Joseph* was the last purchaser. That he had also a different legal title makes no difference. If he had had children there could have been no merger. *Davis* v. *Kirk* (7) is a somewhat similar case.

Maidlow:—Davis v. *Kirk* does not apply. There there was a clear legal devise in fee to trustees, and they were to convey the estate, after the death of a tenant for life, to the person who should answer the description of the testator's heir-at-law.

Dec, 16. PEARSON, J.:—

This case raises the question whether certain real estate descends *ex parte paternâ* or *ex parte maternâ,* and the question arises in this way:—[His Lordship stated the provisions of the will and

(1) 3rd Ed. vol. iii. p. 327.
(2) Cited Doug. 773.
(3) Doug. 771.
(4) 3 Ves. 339.
(5) 1 S. & S. 45.
(6) 8th Ed. p. 450.
(7) 2 K. & J. 391.

the other facts, and continued:—] The question is, how does that moiety of the *Fornside* estate which had belonged to *Joseph's* mother descend; is the descent to be traced *ex parte maternâ* or *ex parte paternâ?* It was argued by Mr. *Maidlow*, on the authority of *Selby* v. *Alston* (1) and other cases, that, inasmuch as *Joseph* never conveyed, and never was asked to convey, the legal estate in the property to the trustees of the will, the legal estate which was in him at the time of his death had descended to him *ex parte maternâ*, and that under these circumstances the descent from *Joseph* must be traced in the same way. There can be no doubt that Mr. *Maidlow*'s contention is perfectly right. In *Selby* v. *Alston* Lord *Alvanley*, M.R., said (2): "In *Philips* v. *Brydges* (3), I stated as a universal proposition, that wherever the legal and equitable estates, uniting in the same person, are co-extensive and commensurate, the latter is absorbed in the former." But against that it was argued by Mr. *Cozens-Hardy*, that sect. 2 of the 3 & 4 Will. 4, c. 106, applies. That section runs thus: "That in every case descent shall be traced from the purchaser; and, to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser unless it shall be proved that he inherited the same."

Mr. *Cozens-Hardy* said that the present case comes within the purview of that section, the object of which was to limit the necessity of going back many steps in order to trace descent. He said that *Joseph* was the last person entitled, and that he, therefore, must be considered to have been the purchaser, and the descent must be traced from him in the ordinary way *ex parte paternâ*. To that it is answered, No doubt *Joseph* was the person

(1) 3 Ves. 339.
(2) 3 Ves. 341.
(3) 3 Ves. 120, 126.

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last entitled, but he inherited the property, because he took the legal estate from his mother. As to that there can be no doubt; it appears on the face of the will that he did, and, inasmuch as there was no conveyance of the legal estate made during his life, the legal estate which was in him at his death was the same legal estate which he derived from his mother. I think that argument is correct, and I must hold, under this section of the Act, that, although *Joseph* was the person last entitled, still it is proved that he inherited from his mother, and as it is also proved that she inherited from her mother, the descent must now be traced from the maternal grandmother, who must be taken to have been the last purchaser.

Solicitors: *Bompas, Bischoff, Dodgson, & Coxe,* agents for *Waughs & Musgrave, Cockermouth; Tathams & Procter,* agents for *Broatch & Hall, Keswick.*

W. L. C.

EDEN *v.* WEARDALE IRON AND COAL COMPANY.

C. A.
1884
V.-C. B.
Oct. 31.
C. A.
Dec. 5, 6, 8.

[1884 E. 321.]

Practice—Third-party Procedure — Counter-claim by Third Party against Plaintiff—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 48, 52, 53; *Order* XIX., *r.* 3.

The Court has no power to give a third party who has been served with notice by a defendant under Order XVI., r. 48, leave to file a counter-claim against the original plaintiff.

SIR *WILLIAM EDEN*, Bart., the Plaintiff in this suit, claimed to be the owner of a piece of freehold land at *Middridge*, in the county of *Durham*, and of the coal and fireclay thereunder.

In October, 1880, a correspondence passed between the Plaintiff and the Defendants, the *Weardale Iron and Coal Company, Limited*, which, as the Plaintiff claimed, amounted to an agreement for leasing to the Defendants the coal and fireclay under the Plaintiff's land for twenty-one years.

In the latter part of 1881 the Defendants commenced to work the coal and fireclay, but were served with a notice by the Ecclesiastical Commissioners for *England* that the coal and fireclay belonged to them as lords of the manor. The Defendants therefore refused to accept the lease from the Plaintiff.

The Plaintiff accordingly brought the present action claiming specific performance of the agreement for a lease and an account of the minerals worked, and damages.

The Defendants put in a defence stating the circumstances, and on the 12th of June, 1881, served notice on the Ecclesiastical Commissioners under Order XVI., r. 48, claiming indemnity from them in the event of the Plaintiff establishing his claim.

The Defendants took out a summons for directions for the trial of the question between the Defendants and the Ecclesiastical Commissioners, and on the 30th of June an order was made on the summons, giving the Ecclesiastical Commissioners leave "on or before the 21st of July, 1884, to deliver a counter-claim in this action."

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On the 30th of July the Ecclesiastical Commissioners obtained another order in Chambers giving them leave to deliver a statement of defence with their counter-claim.

On the 11th of August the Ecclesiastical Commissioners put in a defence and a counter-claim to the Plaintiff's claim. In the statement of defence they claimed the minerals under the whole of the Plaintiff's land, and in the counter-claim they stated that some part of the surface was freehold and part copyhold of their manor, and that the boundaries had become confused; and they claimed to have the boundaries of the freehold and copyhold ascertained.

The Plaintiff moved before Vice-Chancellor *Bacon* on the 31st of October, 1884, to strike out the counter-claim.

Sir *Arthur T. Watson*, for the Plaintiff.

Elton, for the Ecclesiastical Commissioners, was not called on.

BACON, V.C.:—

I do not think there is any ground whatever for what Sir *Arthur Watson* asks me to do. The object of the orders and the object generally of the practice is to bring into one suit all the questions that can properly arise out of the claims of the several parties. I think the counter-claim does, within the terms of the rule, bring the question between the parties in a proper state for decision, and if any objection can be taken it must be taken at the hearing, but not by way of mutilating the proceedings which the Ecclesiastical Commissioners have thought it right to institute under the notice to them as third parties.

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From this decision the Plaintiff appealed. The appeal came on for hearing on the 5th of December, 1884.

Sir *Arthur T. Watson*, for the Appellant:—

The notice was issued under Order XVI., r. 48, of the rules of 1883. Rules 52 and 53 shew what is to be done. The Judge may order the question of liability as between the third party and the defendant giving the notice to be tried in such manner as he

shall direct, or may give the third party liberty to defend the action, and give such directions as he may think proper for having the question, that is the question between the defendant and the third party, most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action. There is not a word in the rules that points at trying another question between the third party and the plaintiff. It is true that we were present when the order was made giving leave to the Ecclesiastical Commissioners to deliver a counter-claim; but the order is vaguely expressed, and we understood it as meaning a counter-claim between them and the Defendants. There is nothing in the rules which gives power to the Court to give leave to the third party to counter-claim against the Plaintiff.

Elton, for the Ecclesiastical Commissioners:—

Our contention is, that under Order XIX., r. 3, we are empowered to deliver a counter-claim, for we have got leave to defend the action. When this leave is given to the third party he becomes a defendant and has the powers of one.

By the interpretation clause (sect. 100) of the *Judicature Act*, 1873, "'Defendant' shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings," and we come within this definition. Then sect. 24, sub-sect. 3, of the same Act enables the Court to give to any defendant all such relief against the plaintiff as he shall have properly claimed by his pleading. A third party would not be allowed to counter-claim if the action would thereby be made too complicated, or if the subject-matter of the counter-claim were irrelevant to the original action; but here the action cannot be properly disposed of without entering into the subject-matter of this counter-claim. *Street* v. *Gover* (1) has a bearing against us; but that case was doubted by the Court of Appeal in *Toke* v. *Andrews* (2). If we are not Defendants how can the Plaintiff make this application under Order XXI., r. 15, which only applies in the case of a defendant setting up a counter-claim? The object of the third-party procedure is that there may

(1) 2 Q. B. D. 498. (2) 8 Q. B. D. 428.

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be one trial and all matters in litigation between the parties then decided: *Schneider* v. *Batt* (1); *Witham* v. *Vane* (2).

BOWEN, L.J. :—

This is a case in which the *Weardale Iron and Coal Company* were sued by the Plaintiff. The Ecclesiastical Commissioners were brought in as third parties by the Defendants. At Chambers two orders were made couched in rather vague language, giving the third parties leave to file a counter-claim, but not saying whether the counter-claim was to be against the Plaintiff or against the Defendants, or both. The third parties have filed a counter-claim against the Plaintiff, and the Plaintiff has taken out a summons to strike out the counter-claim. We have to decide the question of practice, which is one of considerable importance, whether a third party against whom indemnity or contribution is claimed by the defendant is entitled to obtain leave to file a counter-claim for relief, not only against the defendant who has brought him into the suit but against the original plaintiff. I have come to the conclusion that there is no power in the Court to grant such leave. I should be sorry to do anything to militate against the principle of the *Judicature Act*, that all questions in controversy raised in an action ought, if possible, to be finally decided in the action; but this is a point of practice, and we must consider whether any machinery has been provided by the rules for deciding an issue between the plaintiff and the third party in the manner suggested. I am of opinion it was not intended, and that the rules do not permit, that a counter-claim should be filed by a third party against the original plaintiff. By the *Judicature Act*, sect. 24, sub-sect. 3, the Legislature has directed that "the Courts respectively, and every Judge thereof, shall also have power to grant to any defendant . . . all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause

(1) 8 Q. B. D. 701, 704. (2) 49 L. J. (Ch.) 242.

or matter, and in like manner claimed against any other person whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court, or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant." The counsel for the Ecclesiastical Commissioners referred to the interpretation clause of the same Act, sect. 100, by which it is provided that the word "'defendant' shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings;" and they contended that the effect of this definition is that a person who is made a party under the third-party procedure is entitled to all such relief against the plaintiff as if he were originally a defendant. But I am not satisfied that a third party is a person who can be said to be "served with notice of or entitled to attend any proceedings." But whether that be so or not, when we come to apply this definition to any particular case, we are thrown back upon sect. 24, sub-sect. 3, and it is clear that in that clause a third party is not a defendant for all purposes or against all claims. Then, when we look at the rules, we find a specific portion of Order XVI. devoted to the subject of the third-party procedure.

There are two ways of dealing with a third party. The defendant may apply to the Court under rule 52, and the Judge "may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct." So far as this rule goes, it must be a question between the third party and the defendant that is to be tried. It cannot be said that this would apply to the counter-claim which the Ecclesiastical Commissioners desire

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to bring against the Plaintiff. Then if we turn to rule 53, which permits the third party on leave obtained from the Court to defend the action, it is clear that here no such leave has been given or sought.

That seems to me sufficient to decide the question before us. If the application had been for leave to the third party to counter-claim against the Defendant, I should have desired to consider the question. It appears to me an open question whether the Court could have given leave. There is language in some of the cases which seems against it, but I should not like so to decide without further consideration. But when, as here, it is a question of a counter-claim by the third party against the Plaintiff, it is clearly outside the third-party procedure.

Although it is not necessary to fall back on the argument of convenience, I may say that I think any other interpretation of the rules than what I have put on them would lead to great inconvenience, because the plaintiff who wishes to have a question decided expeditiously between himself and the defendant might find himself embarrassed by questions between himself and the third party with which the original issues in the suit had nothing to do.

I think therefore the appeal must be allowed, and the counter-claim must be struck out.

I ought to add that it appears to me that the difficulty has arisen in great measure from the vagueness of the drafting of the original order.

FRY, L.J.:—

I am of the same opinion. The question on this appeal is whether a third party introduced by a defendant can serve a counter-claim on the original plaintiff.

The primary object of the introduction of a third party is to prevent the necessity of two actions. In the first place, it is for the determination of all questions between the plaintiff and the defendant who brings in the third party, and in the second place, for the determination of questions between the defendant and the third party, against whom the defendant claims contribution or indemnity. I think it is confined to these two classes of

questions. If the procedure is extended to questions between the plaintiff and the third party, it will cause great inconvenience to litigants. Order XVI., rule 49, provides that "if the third party desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action." Those are the two classes of questions to which I have referred.

It was contended by Mr. *Elton* that the definition of a defendant in sect. 100 of the *Judicature Act*, 1873, gives the third party all the rights of a defendant, and among them that of counter-claiming against the plaintiff. The words of the section are: "'Defendant' shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings." I do not think that includes a third party. He is certainly not "served with any writ of summons or process." The only question is whether he comes under the words "served with notice of or entitled to attend any proceedings." These words seem to me to be intended to apply primarily, if not exclusively, to persons attending or served under Order XVI., rule 40, by which in certain actions persons interested may be served with notice of the judgment, and may have liberty to attend the proceedings. We are all familiar with the practice in the administration of estates in Chancery. Then if we refer to rule 48 which regulates the third-party procedure, we find that he is to be served with a special notice created by that rule to the effect that the defendant claims indemnity or contribution against him. That does not appear to me notice of a proceeding within the definition contained in the 100th section. Therefore I agree that this appeal must be allowed.

Solicitors: *Shum, Crossman & Co.*, for *Trotter, Bruce & Trotter, Bishop Auckland; White, Borrett & Co.*

M. W.

C. A.
1884
Dec. 8, 9, 18, 19.

CLEATHER *v.* TWISDEN.

[1882 C. 1285.]

Partnership—Firm of Solicitors—Deposit of Bonds with one Partner—Liability of Firm—Scope of Business.

Trustees under a will deposited certain bonds payable to bearer with *P.*, a member of the firm of solicitors who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter-book of the firm and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. *P.* paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. *P.* misappropriated the bonds:—

Held (reversing the judgment of *Denman*, J.), that the cheques, letters, and entries were too ambiguous to affect the other partners with acquiescence in *P.* having the custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation.

Harman v. *Johnson* (1) and *Earl of Dundonald* v. *Masterman* (2) considered.

THIS was an appeal from a judgment of Mr. Justice *Denman* (3).

The Plaintiffs were *Edward Gordon Cleather*, *Gabriel Gordon Cleather*, and *Rosser Dean*, the executors and trustees under the will of Colonel *Cleather*, who died in 1875. The estate was left to his widow, Mrs. *Cleather*, for life, and after her death to be divided between *Barclay Cleather* and the Plaintiff, *Gabriel G. Cleather*. The testator had employed the firm of *Hayes, Twisden & Co.*, which consisted of *T. E. Twisden*, *Charles Lewis Parker*, and *Andrew Kelley* (since deceased), and the executors continued to employ them, *Parker* having the entire management of that business. Part of Colonel *Cleather's* estate was invested in three *New Zealand* bonds for £500, one *Cape of Good Hope* bond for £500, one for £100 and two for £200, all payable to bearer. These bonds had been kept by *G. G. Cleather*, one of the executors, but on leaving *London* in March, 1877, he, with the assent, as was alleged, of the others, delivered the bonds to *Parker* for safe

(1) 2 E. & B. 61. (2) Law Rep. 7 Eq. 504.
(3) 24 Ch. D. 731.

custody in the strong-room of the firm, though it was not ascertained whether they were put there. Soon afterwards one of the £200 *Cape* bonds was paid off, and the money was received by *Parker* and duly accounted for. Afterwards two other *Cape* bonds were sold and the proceeds were duly accounted for, but there remained the three *New Zealand* bonds for £500 and one *Cape* bond for £200. The dividends on these, which were paid by coupons, were duly accounted for by *Parker* and paid to Mrs. *Cleather*, the tenant for life. She died early in April, 1880, when the estate became distributable. In November, 1881, *Parker* absconded, and it was then discovered that he had misappropriated these bonds and also other moneys belonging to Colonel *Cleather's* estate.

The executors brought this action against *T. E. Twisden*, claiming a declaration that as a partner of the firm he was liable to make good the value of these bonds and also other moneys intrusted to *Parker* for investment on mortgage, as to which the liability of *Twisden* was scarcely disputed. As to the bonds, the Defendant contended that he knew nothing about their being in *Parker's* custody, and that they were entrusted to *Parker* as a private friend of the family, and not as a matter of business undertaken by the firm.

The principal evidence against the Defendant consisted of letters written by *Parker* and charged for in the bills of costs, copies of which appeared in the letter-book of the firm.

Parker used to take the coupons of the bonds and paid the amounts to the persons entitled; but on four occasions he paid the amounts by cheques drawn in the name of the firm on the firm's bankers, and repaid the firm by his own cheques on his private account.

The following letters were mainly relied on by the Plaintiffs:—

13th of April, 1880. *C. L. Parker* to Mrs. *Bell*, a daughter of the testator, who was entitled to a legacy of £4000 under his will.

"It is proposed to allot for your £4000 an existing mortgage of freehold property for £3000, paying 4½ per cent., and a *New Zealand* bond for £1000, paying the same rate of interest, both of which are in my custody, and on which I receive the interest regularly every half-year."

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15th of April, 1880. *C. L. Parker* to *R. Dean.*

"Mrs. *Bell* approves of the apportionment made to her in respect of the legacy of £4000, namely, the mortgage of £3000 and the *New Zealand* bond for £1000, and she wishes the capital to be undisturbed."

31st of May, 1880. *C. L. Parker* to *R. Dean.*

"I have taken some steps towards paying off the legacies under the Colonel's will by ordering the sale of the *L. N. W. Railway* stock (£767), and £500 out of the *Cape* bonds (£800), and send you on the other side a note of their realization . . . . . The *Cape* bonds being £500, £200, and £100, I am obliged to realize the £500."

18th of November, 1880. *C. L. Parker* to *Barclay Cleather.*

"I find the *New Zealand* bonds cannot be exchanged except at a cost of 10 per cent., so I think it will be best to let the matter rest for the present and I can apportion the interest when it falls due between you and *Gabriel.*"

3rd of January, 1881. *C. L. Parker* to the Plaintiff.

"After the 15th I shall have to send you your portion of the interest on the £500 *New Zealand* bond which is retained for the present as arranged, as I found it would cost too much to get it exchanged for smaller bonds."

15th of February, 1881. *C. L. Parker* to the Plaintiff.

"I hold the £500 *New Zealand* (not *Cape*, as you say), 4½ bond for you and *Barclay* and will receive and divide the coupons in fifths between you."

In the bills of costs, besides the charges for the letters before referred to, there was a charge on the 27th of June, 1877, as follows:—

"Attending Mr. *G. Cleather* subsequent to correspondence in reference to the investment of the money and other questions arising, and obtaining his indorsement on policy of insurance in favour of purchaser."

In February, 1881, *Parker* made out a statement of account of

the estate of Colonel *Cleather* which had come to the hands of the executors and trustees. This account included the mortgages and the *New Zealand* and *Cape of Good Hope* bonds, as well as other portions of the property which have not passed through the hands of the firm.

The bills of costs contained the following item:—

"Drawing residuary account and schedules of debts, legacies, &c., and five copies in duplicate, attendance, obtaining signature thereto, and at *Somerset House* paying account, getting duty assessed, and paying same. . . ."

Mr. Justice *Denman* held that the Defendant was responsible for the amount of the *New Zealand* and *Cape of Good Hope* bonds which had been entrusted to *Parker*, and gave judgment to that effect, but he made no order as to costs upon that part of the claim.

From this judgment the Defendant appealed.

Rigby, Q.C., and *Rawlins*, for the Appellant:—

There is no evidence that the Appellant had any actual knowledge that *Parker* had been entrusted with the bonds: on this point the Judge in the Court below was in our favour. It is also admitted that it is no part of the ordinary duty or business of a solicitor to take care of bonds payable to bearer, and it is clearly in evidence that the firm of *Hayes, Twisden & Co.* were not in the habit of undertaking this duty. Therefore what *Parker* did was beyond the scope of the partnership, and unless it can be proved that the other members of the firm had notice, either actual or by necessary implication, of his conduct, they cannot be made liable: *Harman* v. *Johnson* (1). The evidence of notice relied on by the Plaintiffs is as follows: First, the cheques paid by the firm's bankers. But as a general rule *Parker* paid the interest to the persons entitled out of his private account, and on the few occasions when he drew upon the firm's bankers he immediately recouped the firm account by a draft upon his own account. This was the natural mode of proceeding of a partner who was treating a transaction as a private matter of his own. Secondly,

(1) 2 E. & B. 61.

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it is said that certain letters were entered in the letter-books of the firm and were charged for in the bills of costs. But these letters are only notice of what was stated in them, and although some of them refer to *Parker* having the bonds in his possession, they are all consistent with the fact that he held them as the private friend of the family, not as a member of the firm: *Sims* v. *Brutton* (1). Thirdly, it is said that the statement of accounts made out by *Parker* and charged for by the firm included these bonds. But the statement was a general statement of the property for which the executors were accountable, and included several portions of the assets which did not pass through the hands of the firm. The bonds were deposited with *Parker* before the estate became distributable, and even after the death of the tenant for life the firm did not undertake the general distribution of the assets; they only advised the executors in their distribution, and only dealt with such parts as came into their own hands, such as the mortgages. Those they duly accounted for.

Barber, Q.C., and *Clare*, for the Plaintiffs:—

Parker may have been a friend of the family, but the bonds would not have been entrusted to him unless he had been a solicitor; he took charge of them in his professional character, and all his letters respecting them are written from the office of the firm, and in some cases he paid the interest by the firm's cheques. Although it may not be the ordinary business of solicitors to take charge of bonds, it is not unfrequently done by them. In the present case the firm were employed in collecting and distributing the testator's estate; it is admitted that some part of the estate passed through their hands, and there is no reason why these bonds should not be taken to have come into *Parker's* hands for professional purposes. But if he was not acting strictly within the scope of the partnership, there is sufficient evidence to shew that the other partners had acquiesced in the transaction. We have the drawing of cheques, letters entered in the letter books, and entries in the books of costs, and finally the reference to these bonds in the statement of the assets of the testator. Entries in the books of a partnership have always been

(1) 5 Ex. 802.

considered sufficient to affect the partners with notice: *Marsh* v. *Keating* (1); *Blair* v. *Bromley* (2); *Earl of Dundonald* v. *Masterman* (3); *Sandilands* v. *Marsh* (4); *Alliance Bank* v. *Tucker* (5). *Sims* v. *Brutton* (6) is difficult to reconcile with *Marsh* v. *Keating* and has been doubted: *Lindley* on Partnership (7). We do not say that each letter or entry taken by itself would be sufficient evidence of notice, but taken all together they amount to sufficient evidence to affect the other partners with notice. They must either have known that *Parker* had the bonds, or else must have wilfully shut their eyes to his proceedings. The evidence also shews that the bonds were left with *Parker* in accordance with his advice, and the giving of such advice was certainly within the scope of his profession, and therefore the firm was responsible for the consequences of the advice.

BAGGALLAY, L.J.:—

This case has been very ably argued on both sides, and the force of Mr. *Clare's* argument has not been reduced by being made comparatively short. The case of the Plaintiffs is, that as the trustees under the will of Colonel *Cleather* they had in the year 1877 deposited a portion of his estate consisting of certain bonds payable to bearer in the hands of the firm of *Hayes, Twisden, & Co.*, the solicitors of the estate, for safe custody; that when on the death of his widow Mrs. *Cleather* in 1880 the estate was distributed these bonds were not forthcoming. Their contention is that the bonds were deposited with *Parker*, a member of the firm, and that all the members of the firm were jointly and severally liable. *Kelley*, one of the members of the firm, is dead, *Parker* has absconded, and this action is brought against the remaining partner *Twisden* to recover from him the value of the bonds in question.

These bonds were in fact deposited with *Parker* by *Gabriel Cleather*, one of the trustees, but the Defendant contends that they were not so deposited with *Parker* as representing the firm

(1) 2 Cl. & F. 250.
(2) 2 Ph. 354.
(3) Law Rep. 7 Eq. 504.
(4) 2 B. & A. 673.
(5) 17 L. T. (N.S.) 13.
(6) 5 Ex. 802.
(7) 4th Ed. p. 308.

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but in his character of a private friend of the family. There is no difficulty as to the law. The cases mainly relied on were *Harman* v. *Johnson* (1) and *Earl of Dundonald* v. *Masterman* (2). In *Harman* v. *Johnson*, which was cited by the Appellant, the law is stated as follows. I read from the marginal note: "The receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners." But though the law may be so stated, no one will deny that a course of conduct may be pursued which may convert the act of a partner for which the other members of the firm would not be otherwise liable into one for which they will be responsible. The other case, on which the Respondents relied, was one in which that principle was acknowledged, namely, *Earl of Dundonald* v. *Masterman*, the head-note of which is as follows: "Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received." In that case the plaintiff being under pecuniary pressure employed the firm in reference to arranging his affairs, and the particular sum received by the partner was received by him in performance of the duties for which the firm was employed.

In the present case Mr. Justice *Denman* decided that the Defendant was liable. Having carefully considered his Lordship's judgment I am bound to say that if we take those portions of the judgment which relate to the law I substantially agree with them. His Lordship says (3): "If upon the whole, the evidence shews that, judging from the cheques, letter-books, bills of costs, and documents, the Court comes to the conclusion that the firm must

(1) 2 E. & B. 61. (2) Law Rep. 7 Eq. 504.
(3) 24 Ch. D. 735.

have been aware that *Parker* was acting in the distribution of the money forming part of the trust, then I think that, according to the authorities, I am bound to say that each and every partner is liable." But I do not agree with the conclusion to which the learned Judge has come to as to the facts. It has not been suggested that Mr. *Twisden* had any personal knowledge of the fraudulent acts of his partner. The ground of his alleged liability is that the firm of which he was a member was responsible for any loss caused by the conduct of any of the partners. We have then to see what were the circumstances which led the learned Judge to the conclusion at which he arrived. He took rather a stronger view than I do of the result of the evidence. It is chiefly on the documentary evidence that the Plaintiffs seek to make the Defendant liable First, there are the cheques, which were drawn with reference to the interest on the bonds on the firm's bankers. There was no trace of any actual dealing by the firm with any of the coupons, but in four instances, shortly before the coupons became payable, *Parker* drew cheques in the name of the firm on the firm's bankers for the amount, and remitted them to the persons entitled to the coupons. Standing by itself this circumstance would be important, as pointing to the fact that the firm had the coupons: but on each occasion when the amount of the coupons was paid with the firm's cheques, *Parker* paid to the account of the firm cheques on his own private account for sums of the same amount. It is difficult to say why a person contemplating a fraud does a particular act in carrying out his plan, but if *Parker* had then made away with the bond I can understand his making the accounts straight by giving a cheque of his own for the amount. It may have been a fraudulent arrangement to make these cross entries. At all events, the firm got nothing by it. However we have no information as to his reasons for acting in this way. But it does not appear to me that it necessarily indicates any knowledge on the part of the firm, or that they shut their eyes to what *Parker* was doing.

It was then said that from time to time letters were written by *Parker* and that they were inconsistent with anything else but the bonds being in the custody of the firm. Mr. *Barber* contended that although each letter by itself did not prove anything, yet if we

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looked at the result of all of them together they affected the firm with knowledge. He said he would limit his arguments to the letters, copies of which appeared in the letter-book, and in respect of which there were charges in the bills of costs. These were letters extending from the 13th of April, 1880, to the 15th of February, 1881, but in all these letters there is nothing which is not consistent with either one view or the other, namely, with the bonds being in possession of the firm or of *Parker* alone. The strongest letter of all in support of the Respondents' contention is that of the 13th of April, 1880, from *Parker* to Mrs. *Bell*, which is charged for in the bills of costs. She took a legacy under the will which was not payable till her brother's death. [His Lordship read the letter.] We cannot help seeing from that letter that although *Parker* suggests that Mrs. *Bell* should accept the *New Zealand* bonds, he suggests that they should be left with him and that he should send her the interest, thus avoiding the disclosure which would take place if he were called on to hand over the bonds. The mortgage was no doubt in the hands of the firm, and it would properly be in their possession, having regard to the fact that they had carried that matter through and had charged for it; that was the proper work of solicitors; and also it was subject to a life interest until Mrs. *Cleather's* death, when the money was divisible among the legatees. He says: "both of which are in my custody." The mortgage was not in his custody, but in that of the firm. He confounds the two together, and it is argued that as the mortgage was in the possession of the firm, we must conclude that the bonds were also. But he does not say so. He uses evasive language. We know the fact that the mortgage was in the possession of the firm and that the bonds were either in *Parker's* sole control or else had been sold. No doubt it is consistent with the letter that the bonds were in possession of the firm, but in my opinion it is equally consistent with the other view, and the onus is on the Plaintiffs to prove that the bonds were in the custody of the firm. It is not necessary to go through the other letters relied on. With respect to them I have come to the same conclusion, that they are consistent with either view of the case.

Another point is, that all these letters are charged in the bills of costs as business of the firm. It is true that these bills of costs

were never delivered, but they existed and had been prepared, and the amounts entered in the ledger account against the trustees. Therefore, it is said that the firm has adopted these letters, and that we must assume that they are affected with knowledge that the bonds were in the custody of *Parker* on behalf of the firm. I do not agree with this conclusion. I do not think that the letters prove this knowledge. I do not think that the fact of their being charged for in the bills of costs proves it.

Reliance is then placed on the statement of account. But what is that account? It is a mere preparation of a balance-sheet for the trustees. Solicitors prepare a balance-sheet between the trustees and the *cestuis que trust*, not only of the amount of assets that pass through the hands of the firm, but of those which pass through the hands of the trustees, or which belong to the estate in any other way. Solicitors are not confined in making out such accounts to sums passing through their own hands. In the present case a part of the assets had never passed through their hands. The only conclusion is, that this is a case very near the line—somewhat similar to *Earl of Dundonald* v. *Masterman* (1)—but the burden of evidence rests on the Plaintiffs, and we must come to the conclusion that they have not proved their case. The appeal must, therefore, be allowed.

BOWEN, L.J. :—

I am of the same opinion. Although we differ from Mr. Justice *Denman* in the conclusion at which we have arrived, that difference arises solely from the different view we take of the facts. We agree entirely with him in his view of the law. This is a case which falls very near the line. To the best of my judgment the Plaintiffs' case approaches very near the line but never crosses it, and they fail accordingly to prove their claim to relief.

The claim is against the firm to which *Parker* belonged in respect of the custody of certain bonds by *Parker*. This is conceded to be beyond the ordinary scope of the business of solicitors, though, of course, it may be brought within it by special circumstances. Therefore, proof must be given by the Plaintiffs of some fact or facts, some circumstance or train of circumstances,

(1) Law Rep. 7 Eq. 504.

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which are more consistent with the view that it had become firm business, or at all events, which would lead the Plaintiffs to suppose that it was firm business.

The Plaintiffs rely on the facts in this case to shew this, but I wish first to say a few words as to the law. The law upon this point is very simple. We have first what is laid down in *Harman* v. *Johnson* (1) as to what is within the scope of a solicitor's business. He is not a scrivener; it is not his duty to take charge of bonds payable to bearer. Next we have the law of principal and agent. This is a case in which we have to apply to a mass of correspondence the ordinary law of principal and agent, in order to see if the firm have so acted as to make *Parker* their agent for the purpose of this particular business. The case which has been so often referred to, *Earl of Dundonald* v. *Masterman* (2), only illustrates the application of this law to special facts. There it was held that the firm had undertaken a special business besides their ordinary business, and therefore the firm was liable.

How are we then to approach the question in the present case? In the first place, what has happened between the partners and their supposed agent? We must inquire, first, whether they gave him express authority to take charge of the bonds; secondly, if not, whether they ratified what he did; and, thirdly, if they neither expressly authorized nor ratified his acts, whether they consented that he should have general authority to act without their knowing what he did. For it is not enough for a principal to shew that he did not know what his agent was doing, for he may have consented to leave the matter in his agent's hands. In ninety-nine cases out of a hundred partners do not know what their partner does in any particular business, because they have consented not to know. Therefore, we have to study the books of the firm in this case, not only to find out whether what *Parker* did was done with the knowledge of the other members of the firm, but whether there was such a course of dealing between them as shewed that the other partners allowed *Parker* to act without communicating with them, although not actually authorizing him to act in a particular way. So if we found the business entered in the firm books, this might be evidence of a consent

(1) 2 E. & B. 61. (2) Law Rep. 7 Eq. 504.

that he should so act. That is one ground on which the Appellant might be made liable.

But secondly, there is the question whether as between the world outside and the firm, the other members of the firm have so acted as to make themselves liable. Looking at the letters in this case for which the firm is responsible, we have to see what impression they would make on third parties to whom they were communicated, what reasonable inferences such third parties would draw from them.

Thirdly, we must remember there is a distinction between the question whether evidence is admissible and the question what effect ought to be given to it when it is admitted. For instance letters written by *Parker* to the Plaintiffs and charged for by the firm are admissible in evidence against the firm. But when admitted what do they prove against the firm? That depends on the true meaning to be put upon their language. Assuming that they are in evidence, first, do they shew that *Parker* was in fact authorized to do what he did, as between himself and the firm? Secondly, was there anything in the documents communicated to the Plaintiffs which could justify a reasonable mind in concluding that the firm had authorized *Parker's* custody of the bonds.

I have carefully read all the documents which are relied on in this case, and I have come to the conclusion that though they are very near the line, none of them cross it. It is said that though none of the letters or entries taken singly prove the Respondents' case, yet the whole taken together do. But the only real effect of a series of letters, none of which contain anything inconsistent with the Defendant's case, is to lead one to believe that the series was written upon some system. That is, in fact, the inference I do draw. We know now that *Parker* was acting fraudulently, and in my opinion he intended that if any of the letters came before his partners he might take refuge in the language which he meant to be doubtful. That the bonds were in the custody of *Parker* is common ground, the real question is whether in letters for which the firm are responsible, language has been used which would justify the Plaintiffs in assuming that *Parker's* custody was the custody of the firm.

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There were four bonds, one *Cape* bond for £200 and three *New Zealand* for £500 each. It is conceivable that the firm might be responsible for one and not for the others, one might have been in the custody of the firm and not the others. March, 1877, was the date of the reception of the bonds by *Parker*. It was argued by Mr. *Rigby* that the bonds were entrusted to *Parker* solely as a friend of the family; I do not take that view; I think they were placed in his hands as a friend but as a solicitor also. But I do not think it is material to discuss the reception of the bonds. The point of the case begins later, the main question is whether the expressions in the documents, letters, and books of the firm justified the Plaintiffs in assuming that the bonds were in the firm's custody.

First, there are the cheques. It appears to me that all these cheques and the entries respecting them are perfectly consistent with the bonds being in *Parker's* sole custody.

Next, there are the letters. I agree that it would be extraordinary if the firm were not to be bound in respect of letters for which they had charged, but they are only bound by such inferences from them as a reasonable man would draw. As to some of the entries in the bills of costs, the interest was first paid by *Parker* by cheques of the firm, and the firm was recouped by his cheques. Taking the letters and entries one by one, I cannot find any expression in any of them not equally consistent with the view that the bonds were in the custody of *Parker* only, and not in the custody of the firm.

We then come to the statement of accounts of the trust property. Although it contains a statement of the funds, that also is perfectly consistent with there being nothing in the hands of the firm, and with the bonds being in the hands of *Parker* alone.

It appears from the judgment of Mr. Justice *Denman* that he considered that the firm had the distribution of Colonel *Cleather's* estate, and therefore must have known where the bonds were deposited. It is true that they were acting in the distribution of the estate, but the Plaintiffs must shew that it was being distributed in such a way as was only consistent with all the assets which were distributed being in the hands of the firm. This they fail to do,

Again, it was said that the trustees had acted under *Parker's* advice in leaving the bonds in his possession, and that the firm was responsible for their having followed that advice. I cannot see that there is any proof of such advice being given; and if it was given, it is only dressing up the old point in a new disguise to say that the firm is responsible. The argument only applies if *Parker* gave advice within the scope of his profession. A solicitor is not the agent of his partners to give advice outside the scope of his profession. I have already said that it was not within the scope of his profession to keep the bonds in his possession, and before the Plaintiffs took advice of that kind they ought to have inquired if *Parker* had authority to give such advice. On the whole, therefore, I agree that the appeal must succeed.

BAGGALLAY, L.J.:—

I wish also to add that in coming to a different conclusion from Mr. Justice *Denman*, it has been merely on the result of the documentary evidence. If it had been a question of oral evidence, and there had been a doubt as to the credibility of the witnesses, I should have had some difficulty in differing from the learned Judge who had heard the witnesses examined.

FRY, L.J.:—

If this had been a case in which we were affirming the decision of the Court below I should have contented myself with concurring with the judgments which have been given by my learned Brethren, but as we differ from that decision I think it is more respectful to the learned Judge who tried the case to state my reasons for coming to the conclusion at which I have arrived.

In the first place, it is not disputed that the custody of the bonds by *Parker* was not within the ordinary scope of a solicitor's business; and, secondly, that there was nothing in the partnership articles in the present case to take it out of the ordinary rule; and, thirdly, that there was no evidence of dealings of the partners with their clients to lead them to suppose that the custody of bonds was a part of their business. There must, therefore, be some other ground for holding the partners liable; there must be something to shew that the partners had given authority to *Parker*

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to take charge of these bonds, or had ratified what he did with respect to them, or else that they had so far closed their eyes to his acts as to make it fair to conclude that they meant to ratify his acts whatever they were.

To begin with the fact of the deposit with *Parker*: it has been put in two ways—first, that the deposit with him was a deposit with the firm; and, secondly, that the bonds were placed in *Parker's* custody by his advice, and that the firm was responsible for the consequences of that advice. If the Judge in the Court below had thought that the result of the evidence was that such advice had been given by *Parker*, I should have hesitated to express a contrary opinion; but this was not his view. For my own part, I doubt very much whether any such advice was given by *Parker*. *Gabriel Cleather* says he consulted *Parker* in the course of a conversation with him and *Dean*. Looking at his letter to *Dean* it seems to me difficult to believe any such conversation to have taken place, or that *G. Cleather* deposited the bonds in consequence of such conversation; it is more likely that he did so from his own opinion of what was best to be done. Then it was said that if such advice were given, the firm was liable for the consequences of it; that is, that although the taking of the bonds would not bind the firm, the giving advice to take them would bind them. This appears to me a confusion of argument, and I come to the conclusion that this ingenious contention cannot prevail.

Then the question remains whether the deposit of the bonds with *Parker* bound the firm. The strongest evidence in favour of the Plaintiffs consist of four cheques, all of which were drawn during the life tenancy of Mrs. *Cleather*. It is true that the cheques drawn for the interest on the bonds were cheques of the firm, but on each occasion *Parker* gave his private cheque to the firm to satisfy the payment. That is a very material fact, and it appears to me only consistent with one view, namely, that he had received the bonds in his individual character, and not as a member of the firm. For if the firm took charge of the bonds why should he pay in a cheque on his private account?

In April, 1880, Mrs. *Cleather* died, and the estate became distributable. A correspondence was relied on extending from

April, 1880, to February, 1881. The first letter, dated the 13th of April, 1880, was the most material, but that is consistent either with the bonds being in the custody of *Parker* or of the firm. If *Twisden* is to be affected through this letter with knowledge that *Parker* had the bonds in his possession, he must also be supposed to have known that he paid the interest on them by his private cheque. At the highest it can be said of all these letters that they are not inconsistent with either view of the question.

Then there is a third piece of evidence relied on by the Plaintiffs, namely, the statement of account made out by the firm in 1881 for the trustees. This appears to me perfectly colourless with regard to the present contention. The account is an account of the estate which had come to the hands of the trustees. It was made out by the solicitors of the trustees but is the account of the trustees not of the solicitors. In many of the items the property was received by the firm; in all these cases it has been accounted for. On the other hand many items related to the property with which the firm had certainly nothing to do, such as investments in railway shares which had never been under their control. Mr. Justice *Denman* has come to a conclusion of fact in which I feel compelled to differ from him. He says (1): "I think that, if taken in a reasonable way, it is impossible not to say, looking at the bills of costs, looking at the letters, looking at the press-copy letter-book, looking at the expressions in those letters, and at the course of dealing, that to a certain extent *Twisden* did know that the trustees were dealing with *Parker* in the distribution of the estate, then it is impossible to escape from the conclusion that, according to the authorities, and especially according to *Earl of Dundonald* v. *Masterman* (2), the Defendant is responsible, innocent though he is of any wrong, and in fact, ignorant of the particular acts in respect of which *Parker* must be held to bind his firm, and certainly of the wrongful acts in respect of which *Parker* has behaved so ill."

He held that *Twisden* must be taken to have known that the trustees had some dealing with *Parker* in the distribution of the estate. There I part company with the learned Judge. That *Parker* was acting in the distribution of the estate in the sense

(1) 24 Ch. D. 738. (2) Law Rep. 7 Eq. 504.

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that he was giving advice with regard to it, and so to speak distributing it on paper, I agree: but if it is meant that *Parker* was dealing in the distribution of the estate in the sense that he is to be treated as having received the whole estate or its produce into his hands for distribution, I differ. He was advising the trustees in the realization of the property, and I do not doubt that as to any parts, such as the mortgages, which were received by *Parker* for distribution the firm would be responsible; but as to the bonds they were not received for the purpose of distribution but for safe custody long before the distribution begun. I therefore agree that the appeal must succeed.

Solicitors: *R. A. Kelley*; *Burton, Yeates, & Co.*

M. W.

C. A. 1885 *Feb.* 11.

HIPGRAVE *v.* CASE.

[1883 H. 2116.]

Specific Performance, Action for—Alternative Claim for Damages, Effect of—Amendment of Pleadings.

The Plaintiff by his statement of claim claimed specific performance of a contract by which he agreed to sell and the Defendant agreed to purchase the lease, goodwill, fixtures, and stock-in-trade of a business; the Plaintiff alleging that he was and always had been able and willing to perform the contract, but that the Defendant refused to perform the same. The statement of claim in the alternative claimed £100 as liquidated damages fixed by the contract for the refusal to perform the contract. The statement of defence alleged false representations by the Plaintiff as to the character of the business, and denied that the Plaintiff was able and willing to perform the contract. The Plaintiff, after the close of the pleadings, gave notice to the Defendant that, unless the Defendant completed the purchase within a week, he should re-sell the business, which he accordingly did. No amendment of the pleadings was then asked for by the Plaintiff, and the action went on to trial. At the trial before *Bacon*, V.C., the Plaintiff's counsel, admitting that the claim for specific performance must be abandoned, sought to recover the £100 as liquidated damages. He did not apply for any amendment of the pleadings. The Vice-Chancellor dismissed the action on the ground that the claim for specific performance failing through the Plaintiff's own act the alternative claim for damages must fail also:—

Held, on appeal (by Earl of *Selborne*, L.C., *Brett*, M.R., and *Cotton*, L.J.)

affirming the decision of *Bacon*, V.C., that, in the absence of any amendment of the pleadings (which ought not at that stage of the action to be allowed), the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before the *Judicature Act* in the Court of Chancery, and that the Plaintiff, having by his own act rendered specific performance impossible, was not in such action entitled to damages.

ACTION for specific performance, or, in the alternative, damages.

The statement of claim set out the terms of a contract between the Plaintiff and the Defendant, whereby the Plaintiff agreed to sell and the Defendant to purchase all the Plaintiff's right, title, and interest in a certain cigar business, the lease of the premises on which the business was carried on, together with all licenses pertaining thereto, and the fixtures, goodwill, fittings, trade-utensils, furniture and effects, and stock-in-trade belonging to the business. It further stated that the Plaintiff by such contract agreed to give up possession of the premises to the Defendant on or before the 1st of May, 1883, at which time the Defendant agreed to take and enter on the same and pay the purchase-money, and that it was further agreed that, if either of the said parties should neglect to perform the agreement, such party should pay to the other the sum of £100 as liquidated damages.

The statement of claim proceeded to allege as follows:—"The Plaintiff is and always has been able and willing to perform the said contract; the Defendant, however, refuses to perform the said contract."

The Plaintiff claimed that the Defendant might be ordered specifically to perform the said agreement or, in the alternative, that the Plaintiff might be declared entitled to payment of the sum of £100 as liquidated damages.

The statement of defence *inter alia* alleged the contract to have been procured by certain false representations made by the Plaintiff to the Defendant before the making of the contract with reference to the character of the business and the length of the lease, and concluded as follows: "the Defendant denies that the Plaintiff is or ever has been able or willing to perform the said contract."

The Plaintiff replied joining issue.

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At the trial before Vice-Chancellor *Bacon* it was proved, in the course of the Plaintiff's case, that after the close of the pleadings the Plaintiff gave notice to the Defendant as follows:—"127, *Strand*. Referring to the contract between us respecting the above premises, I am and always have been able and willing to complete the same, and I now give you notice unless you complete the purchase within a week from this date I shall proceed to sell the property, and hold you liable to pay the sum of £100 damages mentioned in the contract."

The Defendant not completing, the Plaintiff accordingly proceeded to resell the business. The Plaintiff's counsel contended that, though the Plaintiff could not claim specific performance, he was entitled to the £100 liquidated damages, the Defendant having refused to perform the agreement. The Plaintiff's counsel did not apply for any amendment of the pleadings. The Vice-Chancellor, at the close of the Plaintiff's case, held that the alternative right to damages did not arise until there had been a default in specific performance, and the Plaintiff, having himself rendered specific performance impossible, was not entitled to succeed, and that the action must be dismissed.

Against this decision the Plaintiff appealed.

Hemming, Q.C., and *Jason Smith*, for the Plaintiff:—

The Plaintiff had at the time of action brought a right to two remedies in the alternative—to the equitable remedy of specific performance, or, in the alternative, to damages as at common law. There is nothing since the *Judicature Act* to prevent his combining in one action a claim for the two remedies alternatively, and, indeed, he could not properly have taken any other course. He had, no doubt, at the time of the hearing done that which disentitled him to ask for specific performance, but he had a right to damages, and if his action had been brought for damages only he must have recovered; the fact of his having originally included in his action the alternative claim for specific performance cannot affect that right. No amendment of the claim was necessary.

[EARL OF SELBORNE, L.C.:—Is it not open to the Defendant in the action for specific performance to accept the offer of the

Plaintiff still held out to him by that action, and to say that he will perform the contract ?]

An absolute repudiation of the contract gives a right to sue for damages, and cannot be withdrawn.

[EARL OF SELBORNE, L.C. :—There may be a difference between an absolute repudiation before action and a mere omission to traverse the Plaintiff's allegation that the Defendant will not perform the contract.]

The Defendant alleges misrepresentation, and that she is, therefore, not bound to perform. There is no suggestion of willingness to perform the contract on her part.

[EARL OF SELBORNE, L.C. :—Where there has been an absolute repudiation of the contract in fact before action brought, there may be a right to elect to treat it as a breach and sue for damages, the conduct of the Defendant absolving the Plaintiff from the obligation of being ready and willing on his part to perform the contract, but that is not the present case. The Plaintiff here sues for specific performance, and by his own act he establishes the Defendant's allegation that the Plaintiff was not ready and willing to perform the contract.]

For the purposes of the alternative claim for damages, all that is immaterial to that claim in the pleadings may be struck out. It is not material for the purposes of the claim for damages that the Plaintiff should be continuously ready and willing to perform up to the hearing. It is sufficient that he should be ready and willing up to the time of repudiation of the contract by the Defendant.

[EARL OF SELBORNE, L.C. :—Is not the reasonable construction of the alternative claim for damages that it points merely to the jurisdiction of the Court to give damages as an alternative for specific performance as used to be done by the Court of Chancery under *Lord Cairns' Act* (21 & 22 Vict. c. 27) ?]

Lord Cairns' Act is now repealed by 46 & 47 Vict. c. 49. It is submitted that since the *Judicature Act* such a claim for damages as this ought not to be so construed. In *Tamplin* v. *James* (1) it

(1) 15 Ch. D. 215.

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was held by Lord Justice *James* that, where under the old practice a bill for specific performance would have been dismissed without prejudice to an action at law, the Chancery Division would proceed to consider the question of damages.

[EARL OF SELBORNE, L.C.:—I am not prepared to say that in such a case as the present the Court of Chancery would under the old practice have reserved the right to sue at law.]

If the Court should think that the Plaintiff cannot recover on the pleadings as they stand, it is submitted that, all the facts being before the Court, and having been known to the Defendant, to whom no hardship could arise, the Court should amend the pleadings on this appeal, and give judgment for the Plaintiff for the liquidated damages. There was no occasion to ask for amendment, because the objection to the pleadings was not suggested till the judgment of nonsuit, after which it was not open to the Plaintiff to ask for it.

[They cited *Fry* on Specific Performance (1).]

S. Peel (*Marten*, Q.C., with him), for the Defendant, was not called upon.

EARL OF SELBORNE, L.C.:—

I cannot but think that the decision of the Vice-Chancellor was right. If an amendment upon the record would have altered the case, it was for the Plaintiff to make such amendment, or ask for leave to make it, at the proper time and in the proper manner. The proper time would, *primâ facie*, have been when the Plaintiff did that act which made specific performance of the contract impossible. Having omitted to amend then, at any rate he should have applied for an amendment at the hearing. The Court then might have granted such amendment upon such terms as it might have thought reasonable. I do not propose to offer any opinion as to what would have been the result of such an amendment. The Plaintiff has his option with regard to the form of action he will bring and the remedy he will claim. The Plaintiff here elected to sue for specific performance, offering in the usual way on his part specifically to perform the agreement, and alleging his

(1) Sect. 1270.

readiness and willingness to do so, which allegation, though it is in the present tense, must be taken, in my opinion, as importing a continuous readiness and willingness up to the time of the hearing. The Plaintiff thus declaring his election to claim specific performance, and offering on his part specifically to perform the agreement, I construe the prayer at the end of his claim to be a prayer for specific performance, with an alternative prayer for damages as a substitute for specific performance, in case the Court for any reason should not see its way to granting specific performance. I do not think that with regard to the construction of such a claim the *Judicature Act* has made any difference. Therefore I do not think it necessary to discuss what the powers of the Court might be with regard to damages in this case under the *Judicature Act*. Assuming that on a properly drawn claim for them the Court could give the damages which it is now asked to give, I think that the damages were here claimed merely as an alternative for the specific performance claimed upon an allegation of readiness and willingness to give the Defendant the property on paying the price.

The Defendant, in his statement of defence, alleges, besides other matters which it is unnecessary to go into, that the Plaintiff was not able and willing to perform the contract. Such being the state of the record, the Plaintiff puts it out of his power to perform the contract by selling the property, and so disables himself from doing that which by his pleadings he offers to do. He does not, however, then alter his pleadings or make a new case. It is therefore by his own action entirely that he is placed in his present position. I cannot regard this as a merely technical matter. It appears to me to be a matter of substance. The Defendant comes to the trial to meet the case set up by the Plaintiff upon the record, viz., a case entitling the Plaintiff to specific performance or to damages in substitution for performance. I think we are regarding the substance of the case in holding the Plaintiff bound by the form of the claim which he has deliberately elected to make, and in not transforming his claim into a different claim, and the pleadings into different pleadings, at this stage of the proceedings. For these reasons I do not think we ought to give the relief that is now asked for. I

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also think that it is not for us to express any opinion whether any other form of action will now lie, and that we certainly ought not to reserve the Plaintiff liberty to bring an action for damages, a course which I am sure the Court of Chancery would not have taken in such a case as this before *Lord Cairns' Act.*

BRETT, M.R. :—

I agree. I think that, the Plaintiff having by the form of his pleadings and by his conduct of the case elected to put his claim as one for specific performance, with an alternative claim for damages merely as a substitute for specific performance in case for any reason the Court should feel itself unable to give effect to his prayer for specific performance, the Plaintiff cannot now be allowed to change the whole nature of his action by turning it into an ordinary action for damages as at Common Law.

COTTON, L.J. :—

I agree, though I confess I feel some doubt on the question of amendment. I take it that the Plaintiff's claim involves an offer of specific performance on his part, and that he thereby alleges that he is still willing to perform the contract. The essence of his action is the claim for specific performance, and I think the claim for damages must be regarded as merely an alternative claim to meet the possibility of any difficulty arising in Equity with regard to his right to a decree for specific performance. The action being, therefore, essentially an action for specific performance, and continuing to be so up to the hearing, I do not think that any relief can be granted in such an action, when it appears that the Plaintiff has himself prevented specific performance by selling the property. I feel some doubt on the question whether an amendment ought to be allowed, but on the whole I think that, as it was not asked for at the hearing, we ought not to grant leave to amend at the present stage of the proceedings.

Solicitors for Plaintiff: *Weall & Barker.*

Solicitors for Defendant: *Gedge, Kirby, & Millett,* agents for *Berridge & Miles, Leicester.*

E. L.

Ex parte HARRISON.
In re CANNOCK AND RUGELEY COLLIERY COMPANY.

C. A.
1885
Feb. 11.

Company—Transfer of Shares—Shareholder indebted to Company—Liquidation of Shareholder—Trustee in Liquidation, Refusal of Company to register.

By the articles of association of a company it was provided that the directors might refuse to register a transfer of shares while the shareholder making the same was indebted to the company, or if they should consider the transferee an irresponsible person. It was also provided that persons becoming entitled to shares in consequence of the death, insolvency, or bankruptcy of a shareholder might be registered on the production of such evidence as might from time to time be required by the directors, and that any transfer or pretended transfer of shares not being approved by the directors should be absolutely void.

A holder of shares in the company executed transfers of such shares to the nominees of a bank as a security for advances. The company refused to register these transfers, on the ground that the transferor was indebted to the company. Subsequently, the transferor having filed a liquidation petition, a trustee in liquidation was duly appointed. Such trustee, with the consent of the bank and their nominees, applied to the directors of the company to be registered as the owner of the shares, but they refused the application. The bank, though consenting to the trustee's registration, had never waived their security:—

Held (by the Earl of *Selborne*, L.C., *Brett*, M.R., and *Cotton*, L.J.), that the declining to register the transfers by the directors was not a disapproval of them so as to render them void within the meaning of the articles, that the trustee was not entitled to the shares within the meaning of the articles so long as the transfers remained in force, and that the trustee was not entitled to be registered, notwithstanding the consent of the transferees.

APPEAL from the decision of Vice-Chancellor *Bacon* (1), directing the rectification of the register of the *Cannock and Rugeley Colliery Company, Limited*, by inserting therein the name of *Harrison*, the trustee in liquidation of one *Peake*, as the holder of certain shares in the company, but refusing to order the company to pay over to *Harrison* a dividend that had been declared on the shares but remained unpaid.

The facts were as follows: The articles of association of the company, which excluded Table A, contained the following clauses:—

(1) 26 Ch. D. 522.

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In re CANNOCK AND RUGELEY COLLIERY COMPANY.

Article 15. The instrument of transfer of any share in the company shall be executed both by the transferor and the transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

Article 17. The directors may decline to register a transfer of any share or shares whilst the member making the same is either alone or jointly with any other person indebted to the company on any account whatsoever, or if they shall consider that the transferee or transferees is or are an irresponsible person or irresponsible persons.

Article 20. Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or by marriage of any female member, or in any way other than by transfer, may be registered as a member upon such evidence being produced as may from time to time be required by the directors.

Article 21. Any person, who has become entitled to a share in the manner mentioned in the preceding clause, may, instead of being registered himself, request the directors to permit some person to be named by him to be registered as a transferee of such share.

Article 23. Every instrument of transfer shall be left at or sent to the office of the company for approval by the directors, accompanied with such evidence as the directors may require to prove the title of the transferor, and such approval shall be certified in writing under the hands of any two of them indorsed on such instrument of transfer, and thereupon, subject to the power to decline to register hereinbefore contained, the company shall register the transferee as a member.

Article 24: "Any transfer or pretended transfer of any share not being approved by the directors shall be absolutely void, and notice of such non-approval shall forthwith be sent to the member purporting to transfer such share."

Since the 30th of September, 1872, *Peake* had been the registered holder of twenty-seven shares in the company of £80 each, all fully paid up.

On the 25th of August, 1876, *Peake* had executed a transfer of

twelve of the above shares to one *Richardson* as a nominee of *Lloyd's Banking Company, Limited*, and on the 29th of August, 1878, he had executed two other transfers of twelve and three shares respectively to *Howard Lloyd*, also as nominee of the same bank. The three transfers were duly executed by the transferees. It appeared that the transfers were executed by way of security for advances, and on the 30th of October, 1883, the bank's solicitors gave notice to the company that *Peake's* shares had been deposited with the bank by way of equitable mortgage, and required them not to permit a transfer of the shares without the consent of the bank. On the 7th of November following, the bank's solicitors forwarded the transfers to the company for registration.

On the 12th of November, 1883, *Peake* filed a liquidation petition, and on the 29th of November *Harrison* was appointed trustee of his estate. At a board meeting held on the 28th of November, 1883, the directors refused to register the transfers to the nominees of the bank on the ground that *Peake* was indebted to the company in a sum of £2465 0*s.* 9*d.* for coals delivered; and on the same day notice of this refusal was given by the directors to the bank's solicitors.

On the 30th of November, 1883, the bank's solicitors wrote asking that the transfers and certificates might be returned to them, and they were returned shortly afterwards.

On the 25th of January, 1884, *Harrison*, the trustee, gave notice of his appointment to the company, and applied to them to be registered as a member of the company in respect of the shares. On the 20th of February the directors answered, refusing to register him as a member.

On the 21st of February, 1884, *Harrison's* solicitors wrote to the company to ask what were the grounds of their refusal, and stating that they were instructed, not only by the trustee but also by the bank and their nominees, the transferees of the shares, and that the application of the trustee was made with their knowledge and approval. They added that the trustee of course claimed the dividend on the shares. It appeared that the bank and their nominees had assented to the application by the trustee, but it did not appear what the terms of the arrangement between

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the trustee and the bank were. Counsel for the trustee, however, admitted during the argument that the bank had not waived their security, but that some arrangement was to be made with regard to the effect to be given to it between the bank and the trustee when the trustee should be registered.

On the 20th of March the company's solicitors wrote that the directors refused to grant *Harrison's* application, and he thereupon served the company with a notice, dated the 26th of March, of a motion to rectify the register.

The Vice-Chancellor upon the hearing of such motion made an order in the terms above-mentioned.

The trustee appealed against the refusal of the Vice-Chancellor to order payment to him of the dividend, and the company gave notice of contention that the order should be varied instead of cross appeal in accordance with Order LVIII. rule 6.

Millar, Q.C., and *H. Burton Buckley*, for the trustee:—

There is a distinction between transfer and transmission of the shares by act of the law. The right of the company to refuse to register a transfer of the shares until their debt is satisfied is confined to cases of transfer: *In re Bentham Mills Spinning Company* (1). The title of *Peake* as registered owner of the shares passed by act of the law to the trustee, who is entitled to be registered as the owner of the shares notwithstanding the debt due from *Peake* to the company. The transfers to the bank's nominees make no difference. By art. 15 the transferor of shares is deemed to remain the holder of the shares until the transferee is registered. By art. 17 the directors may decline to register a transfer; by art. 23, all transfers must be submitted for the directors' approval; and by art. 24, any transfer not approved by the directors is void. These transfers were not approved of by the directors, so that as between the company and the trustee, at any rate, these transfers do not affect the trustee's title to be registered.

[EARL OF SELBORNE, L.C.:—Would not the bank's nominees be entitled to be registered on satisfying the company's claim?]

The bank consenting to this application, it does not lie in the company's mouth to set up their title in answer to it.

(1) 11 Ch. D. 901.

[COTTON, L.J.:—In order to support the trustee's contention he must shew that he is entitled to the shares, so as to bring himself within art. 20. He is not entitled to the shares within that article, if they belong to others. It is immaterial from this point of view that the bank assents to this application.

EARL OF SELBORNE, L.C.:—Can the fact of the mortgagees of the shares waiving their claim get rid of the company's rights as against them and *Peake?*]

How can the company set up against the trustee the right of the third person, when it is waived by that third person? The meaning of the word "entitled" in art. 20 is entitled as between the person claiming to be a member and the company. It has no relation to the question what equitable rights there may be between such person and third parties in respect of the shares.

F. Thompson (*Marten*, Q.C., with him), for the company:—

The transfers to the bank's nominees were not void by reason of the 24th article. The directors had declined to register under the 17th article, but they had not disapproved of the transfers. The transferees on paying *Peake's* debt to the company could at any time have claimed registration.

The trustee in order to succeed must shew that he is entitled to the shares. He is not so entitled, the title to the shares having been absolutely transferred to the bank's nominees. The title of those transferees is subject to the right of the company under art. 17. If the trustee could not succeed without the bank's consent to the application, he cannot succeed with such consent, for so far as he relies on such consent he relies on the title of the bank's nominees, which is subject to art. 17. He cited *Ex parte Sargent* (1).

Millar, in reply.

EARL OF SELBORNE, L.C.:—

I will first of all deal with this case on the supposition that the transferees on behalf of the bank opposed this application, and after so dealing with it, I will consider whether the fact of their

(1) Law Rep. 17 Eq. 273.

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not opposing the application makes any difference. If the transferees were opposing the application, it appears to me that the question would be simply as between an unregistered prior transferee for valuable consideration and a trustee in bankruptcy of the transferor. The article, which under certain circumstances requires the registration of a person as owner of the shares, does not of itself give any title; it simply proceeds on the supposition that the title to the shares is established, and, on its being so established, provides for registration. The establishment of the title to the shares must be independent of the terms of that provision. Furthermore, it is well settled law that, subject to certain particular provisions of the law of bankruptcy, such as those with regard to reputed ownership, the trustee in bankruptcy stands in the shoes of the bankrupt as against other persons having preferable titles to that of the bankrupt. That being so, let us consider the position of an unregistered transferee for value as against a trustee in bankruptcy. I do not think that it makes any difference that the transfer here was really by way of security. It is not as if the arrangement between the transferor and the bank had been that the shares should remain on the register in the name of *Peake*, the transferor. As far as *Peake* could do it, he gave and intended to give, by way of security, to the transferees the fullest right he was able to give, not only to the beneficial interest, but to that position which registration of the transfer would confer, whether it be called, by way of analogy, the legal title, or by any other expression. He could not say, as between himself and the transferees, that his name ought to remain on the register, if as between them and the company they were entitled to registration. He was completely estopped from denying that his ownership was transferred to them. I think that within the bankruptcy law they became the true owners of the shares, and the provisions of the bankruptcy law with regard to property in the order and disposition of the bankrupt with the consent of the true owner cannot here apply, because there was no consent of the true owners, the transferees having given notice of the transfer to the company and claimed to be registered. *Peake* therefore could not have been heard to say that he was entitled to have his name on the register as against the transferees, if the

company had interposed no impediment to registration on the ground of the debt due to them. It is equally clear that no subsequent transferee, knowing of the transfers to the nominees of the bank would have had a right to be put on the register in competition with the title of the bank. No such transferee could, as it seems to me, take any advantage of the provisions with regard to registration intended only for the benefit of the company; and the same reasoning, in my opinion, applies to a trustee in bankruptcy.

The 15th article of association says that the transfer shall be executed both by the transferor and the transferee, and I take it as admitted that the transfers were so executed, and that there was no objection to the form of them on the part of the directors.

The 17th article of association says that the directors may decline to register a transfer if the member making the same is indebted to the company, or if they shall consider that the transferee is an irresponsible person. The two cases thereby provided for are, to my mind, essentially different. The first case is that in which the transferor is indebted to the company. That provision is made for the company's benefit. I do not think that the declining to register under that provision is a non-approval of the transfer in the sense in which the term "non-approval" is used in a subsequent article. The company only decline to register so as not to lose the right they have against the registered owner in respect of their debt. That refusal might be put an end to at any moment by payment of the debt, and it does not, therefore, seem to me a reasonable construction to treat it as such a non-approval as is provided for in art. 24.

The other case in which the company can decline to register is essentially different. It is where the company do not consider the transferee a responsible person, and there they may altogether reject the transfer.

Then we come to the 24th article, which provides that any transfer not being approved by the directors shall be void. I should not be disposed to insist on the mere letter of the article, but it is impossible not to observe that it does not in terms deal with the case of a refusal to register because the company's

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interest is involved, but of a disapproval of a transfer. There is no general law that a transfer must be approved by the company in order to be valid. The provision seems to me to apply to the case where the transferee is rejected as an irresponsible person. I see no reason for looking upon it as applicable to the case now before us, or as intended to avoid a transaction such as these transfers so far as it is consistent with the rights of the company. I am therefore of opinion that the trustee in liquidation cannot derive title under these articles, so long as any right to be registered remains as between the transferor and the prior transferees. So long as the prior transfers remain in force, he is not entitled within the meaning of art. 20.

I now come to the second question. It is stated that the bank authorized the trustee in liquidation to tell the company that they consented to the proposed registration of these shares in the name of the trustee in liquidation. I will assume that this was so, and that if it were material there was sufficient notice of that consent to the company. If it had been shewn that in point of fact what took place amounted to a release by the bank of all right and interest under the unregistered transfers, so as practically to cancel the transfers in favour of the trustee, the case might have stood on a different footing. We had no evidence of the meaning of that consent, but the counsel for the trustee in liquidation has candidly told us that the bank had no idea of giving up their security. They consented in order to get rid of the right of the company to a set-off in respect of their claim; and, if they could have procured the transfer of the shares into the name of the trustee, then some arrangement was to be made for giving effect to their interest. It seems to me that the company were entitled to say that the 20th article relates only to the title which the trustee in liquidation has under the *Bankruptcy Act*, and does not enable a prior transferee and such trustee to combine their titles in this manner for the purpose of enabling the trustee to be registered on behalf of both, and so to get rid of the company's rights under art. 17. In my judgment, therefore, the consent given by the bank makes no difference. The conclusion at which I arrive is, that the application

to the Vice-Chancellor for registration of the shares in the name of the trustee ought to have been refused, and that his decision must, therefore, be reversed.

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BRETT, M.R., and COTTON, L.J., concurred.

Solicitors for the trustee in liquidation: *Smiles, Benyon & Ollard.*

Solicitors for the company: *Field, Roscoe & Co.*

E. L.

V.-C. B.
1884
Dec. 17.

O'BRIEN *v.* TYSSEN.

[1884 O. 261.]

Devise—Mortmain—Charitable Uses—Secret Trust—Church—Mortmain Act, 9 *Geo.* 2, *c.* 36 [*Revised Ed. Statutes, vol. ii., p.* 403]—*Church Building Act*, 43 *Geo.* 3, *c.* 108 [*Revised Ed. Statutes, vol. iv., p.* 332]—*Site with existing Church—Practice—Demurrer—"Point of Law"—Dismissal of Action—Rules of Supreme Court* 1883, *Order* XXV., *rr.* 1, 2, 3.

A testator, by his will executed three months before his death, devised all his real estate, which included a piece of land of about one acre, with an unconsecrated building thereon licensed by the bishop for public worship, to his wife absolutely. The devise was in pursuance of a secret agreement between the testator and his wife, whereby the latter undertook to hold the land and building upon trust, after her husband's death, to convey the same as and for a parish or district church in perpetuity:—

Held, that the devise was legal under the statute 43 Geo. 3, c. 108, and was not rendered illegal by any provisions of the *Mortmain Act*, 9 Geo. 2, c. 36.

An action having been by the consent of the parties set down for hearing under Rules of Supreme Court, 1883, Order xxv., r. 2, upon a "point of law" raised by the defence, and the point having been decided in favour of the Defendant, the judge, as the decision substantially disposed of the whole action, dismissed the action under r. 3, and with costs, by analogy to the former practice on demurrer.

THIS action came on for hearing under the Rules of the Supreme Court, 1883, Order xxv., r. 2, upon a point of law raised by the Defendant in his statement of defence.

The statement of claim alleged as follows:—

The late Rev. *James O'Brien*, D.D., was for many years prior to and down to the date of his death seised in fee simple of a piece of land in *Cambridge Road, Hove, Sussex*, containing about one acre, upon which he erected a building which was used by him as a private or proprietary church or chapel for the carrying on of public worship according to the rites of the Church of *England*. The building was never consecrated as a church, but was merely licensed by the Bishop of *Chichester* as a place of public worship, and was known as *St. Patrick's Church, Hove*. The value of the building and site was about £15,000, and the pew-rents amounted to about £1100 per annum.

Dr. *O'Brien* died on the 8th of January, 1884, having by his will dated the 2nd of July, 1879, devised and bequeathed all his real and personal estate to his wife, *Octavia O'Brien*, absolutely.

Mrs. *O'Brien* survived her husband, and, by an indenture dated the 3rd of May, 1884, and made between herself of the one part and the Defendant, the Rev. *Ridley Daniel Tyssen*, of the other part, granted the said piece of land and building unto the defendant and his heirs to such uses and for such purposes as she, Mrs. *O'Brien*, should appoint, and, in default of appointment to the use of the defendant his heirs and assigns absolutely.

At the date of this deed Mrs. *O'Brien* was in failing health, and on the 26th of the same month of May she died, without having exercised her power of appointment, whereupon the Defendant claimed to be entitled to, and in fact entered into possession of the land and building under the said indenture.

The Plaintiff, the Rev. *George Edward O'Brien*, who was the heir-at-law of Dr. *O'Brien*, alleged (paragraph 7) that the general devise contained in Dr. *O'Brien's* will in favour of his wife was made by him in pursuance of a secret agreement between himself and his wife, by which the latter undertook to hold the said piece of land and building upon trust, after her husband's death, to convey and assure the same by all necessary deeds as and for a parish or district church in perpetuity; also that Mrs. *O'Brien*, knowing that in her then state of health she might not live for a period sufficient to enable her to convey the land or building in accordance with the formalities required by the *Mortmain Act*, 9 Geo. 2, c. 36, conveyed the same to the Defendant by the above-mentioned indenture upon a like secret trust to that upon which she herself held the same.

The Plaintiff submitted that the secret trust stated in paragraph 7 was illegal, as being in contravention of the provisions of the *Mortmain Act*, and that there was a resulting trust of the land and building in his favour, as Dr. *O'Brien's* heir-at-law; and he alleged that in spite of such resulting trust the Defendant claimed to hold the property as against the Plaintiff absolutely, and was taking steps to have the same vested in the Ecclesiastical Commissioners as and for a parish church in perpetuity in accordance with the said secret trust.

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The Plaintiff accordingly claimed (1) a declaration that the land and building were devised by the testator to his wife upon an illegal trust communicated to her by him and agreed to by her, and that the same now belonged in equity to the Plaintiff as the testator's heir-at-law; (2) a conveyance of the legal estate; (3) an account of mesne profits; (4) an injunction to restrain the Defendant from taking any proceedings for devoting the land and building as and for a parish or district church; (5) a receiver and manager; and (6) costs.

In his statement of defence the Defendant denied that any such secret agreement between Dr. and Mrs. *O'Brien* as alleged by the Plaintiff had existed, or that Mrs. *O'Brien* conveyed the property to him, the Defendant, upon any secret trust, or that he held the property otherwise than as his own absolute beneficial property. The Defendant also insisted that, if the devise of the land and building was affected by a trust for the conveyance of the same as and for a parish or district church, it was a valid and lawful trust and no right or title had accrued to the Plaintiff by reason thereof; and the Defendant claimed in that event the benefit of the statute 43 Geo. 3, c. 108.

By consent of both parties the action was set down for hearing pursuant to Order xxv., r. 2, above mentioned, upon the point of law raised by the statement of defence, namely, whether, if the devise contained in the will of Dr. *O'Brien* to his wife of the piece of land and building mentioned in the statement of claim was affected by a trust, not mentioned in such will, that the premises should be conveyed by the devisee so as to become a parish or district church, the same was a valid and lawful trust having regard to the statute 43 Geo. 3, c. 108, or whether such devise was rendered illegal under the statute 9 Geo. 2, c. 36.

Marten, Q.C., and *J. T. Prior*, for the Defendant:—

The present proceeding corresponds to the old hearing on demurrer which is abolished by Order xxv., rule 1, and for this purpose the allegations of the statement of claim must be taken to be admitted.

The Plaintiff's allegation is that the property was devised subject to a secret trust binding on the conscience of the devisee,

and that such a trust would make the devise void under the *Statute of Mortmain*, 9 Geo. 2, c. 36. Admitting that there was a secret trust, if it is hit by that statute, it is also hit by the subsequent statute, 43 Geo. 3, c. 108, which, as regards gifts within certain limits for providing churches, removes the disabilities imposed by the former Act. The *Mortmain Act*, 9 Geo. 2, c. 36, declares (sect. 3) all gifts of land for charitable uses to be void where made otherwise than according to the requirements of sect. 1, namely, by deed executed at least twelve months before the death of the donor, and enrolled in Chancery within six months after execution. The statute 43 Geo. 3, c. 108, however, exempts certain gifts from the operation of the earlier statute, for it enacts (sect. 1) that a person may by deed enrolled, or will executed, three months at least before his death, as was the case here, give and grant lands or tenements not exceeding five acres or goods and chattels not exceeding in value £500 "for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel" for the celebration of divine service according to the rites of the United Church of *England* and *Ireland*, or a residence for a minister of that church, "and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed." Then sect. 2 enacts that if a gift exceeds the above limits it shall be valid to the extent of those limits. The very object of that Act was the removal of a disability imposed on the owners of land by the *Mortmain Act*, and to enable them to give land to the charitable uses there specified: *Fisher* v. *Brierly* (1). In *Sinnett* v. *Herbert* (2) and *Champney* v. *Davy* (3), the Court acted on the 2nd section of the Act 43 Geo. 3, c. 108, by cutting down a gift of personalty for a church to the statutory limit of £500. The gift of the property in this case is clearly within the statutory limit of five acres, for the land is not more than about one acre in extent. The fact that there is in terms a general and not a specific devise is immaterial, for a general devise is always treated as specific. Although the words of the Act 43 Geo. 3, taken literally, appear to point to a future building, there is nothing prohibiting a devise of a site with a

(1) 1 D. F. & J. 643; 10 H. L. C. 159. (2) Law Rep. 7 Ch. 232.
(3) 11 Ch. D. 949.

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church already built upon it. We ask your Lordship to declare that if there was a trust of the property in the hands of Mrs. *O'Brien*, then it was a valid or lawful trust within the statute 43 Geo. 3, c. 108.

Hemming, Q.C., and *Underhill*, for the Plaintiff:—

In the first place we contend that in order to bring the case within the statute 43 Geo. 3, c. 108, the "purpose" of the gift should have been "expressed" on the face of the will. Here the devise is in terms simply to the widow, not for church purposes. In order to take a case out of the ordinary law of mortmain as it stood at the time of the passing of that statute, the conditions of that statute must be complied with. Here they have not been complied with.

In the second place a gift of land having a church *in situ* does not fall within the purview of the Act 43 Geo. 3. All that a donor can give is either a site for a church, that is, without a building upon it, or £500 for building a church: he cannot give both. When the Act fixes a limit of five acres in the case of land, and £500 in the case of goods and chattels, the evident intention is to fix a limit of £500 in point of value in both cases. It cannot mean to sanction a gift of property worth, as in the present instance, some £15,000.

The words authorizing a gift of five acres of land *or* £500 "for or towards the erecting, rebuilding, repairing, purchasing, or providing" a church, must be read *reddendo singula singulis:* "erecting" is the only word that can relate to the gift of a site, and this is not a gift of land for erecting a church. The Act, therefore, we submit, does not apply at all, and there being, as we allege, and as the Defendant, for the purpose of the present hearing must be taken to admit, a verbal and secret trust for charitable uses attached to the devise of this property, the devise is void, and there is a resulting trust in favour of the Plaintiff.

Bacon, V.C.:—

It appears to me that the question is covered by the Act 43 Geo. 3, c. 108, and that if I were to adopt the Plaintiff's argument I should be repealing that Act.

I must treat this case as if there were plain and positive evi-

dence by some instrument that a secret trust had been declared. This secret trust has been alleged by the Plaintiff in the 7th paragraph of the statement of claim to have been created by an undertaking on the part of the testator's widow that she would hold the piece of land and building upon trust, after her husband's death, to convey and assure the same by all necessary deeds as and for a parish or district church in perpetuity. If there were actual and distinct evidence of that fact—and on the allegation in these pleadings I must take it that there is such distinct evidence—then the case seems to me to come very clearly within the words of the Act of Parliament.

Now, bearing in mind that under the *Statute of Mortmain*, 9 Geo. 2, c. 36, there could be no such disposition made by the testator to his wife on her undertaking that she should hold upon that secret trust, and that such a trust could not be enforced, there comes this statute 43 Geo. 3, the object of which is explained in the preamble to be that of providing churches where churches are required, and which enables a testator, who would be otherwise incompetent, to give his estate, interest or property in any land not exceeding five acres, or goods not exceeding £500, "for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel." I cannot conceive that there can be any doubt as to the meaning of that enactment. Of those several words "repairing, rebuilding," and so on, whether the previous words have any bearing or not upon the present case, the word "providing" is entirely pertinent and applicable. The meaning of the enactment is that a testator may either "provide" a site for a church, or present the fabric if it already exists.

Here a person has a licensed church; that is to say he has obtained the bishop's license to use the building for public worship; and he devises the building to his wife upon what must be taken to be a secret trust that she shall provide a parish church. In my opinion I must decide in favour of what may be called the demurrer, and on the question whether the devise of the piece of land and building mentioned in the statement of claim was affected by a trust, I must hold that it was affected by the alleged trust that the premises should be conveyed so as to

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become a parish or district church, and that the same was a valid and lawful trust having regard to the statute 43 Geo. 3, c. 108; and on the question whether such devise was rendered illegal by the *Statute of Mortmain*, I do not hesitate to say that it is legal under the 43 Geo. 3, and that it is not rendered illegal by any provisions of the *Statute of Mortmain*, 9 Geo. 2.

Marten:—As your Lordship's decision substantially disposes of the whole action, I ask under Order XXV., rule 3, that the action may be dismissed, and with costs, as in the former practice on demurrer.

BACON, V.C.:—

I dismiss the action, and the costs must follow as a matter of course.

Solicitor for Plaintiff: *G. R. Hubbard.*
Solicitors for Defendant: *Norton, Rose, Norton & Co.*

G. I. F. C.

V.-C. B. 1885 Jan. 17, 24, 27.

In re CLITHEROE ESTATE.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 56, *sub-s.* 2 *s.* 58, *sub-s.* 1, *cl.* (*ix.*)—*Limited Owner—Tenant for Life.*

Testator by will, dated the 8th of August, 1883, limited an estate to the use of trustees for a term of 1300 years, and subject thereto to his second son *H. S.* for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, *H. S.* himself being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. The income of the estate was about £26,000 a year, and the amount of the charges about £175,000. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. The testator directed that the trustees should "during the continuance of the last mentioned trusts" enter into and hold possession of the rents and profits of the estate, "and not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned. Very full powers of management were given to the trustees, and the testator provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He moreover gave to the trustees such other powers over the estate as were given to a tenant for life in possession by the *Settled Land Act*, 1882:—

Held, that *H. S.* was not a mere annuitant, but was tenant for life, or a

person having the powers of a tenant for life, of the estate within the meaning of sect. 58, sub-sect. 1, cl. (ix.) of the *Settled Land Act*, 1882, and that his consent was necessary, under sect. 56, sub-sect. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will.

V.-C. B.
1885
In re CLITHEROE ESTATE.

THIS was a petition, presented by the Hon. *James Archibald Douglas Home*, *Frederick Iltid Nicholl*, and *Henry Frederick Nicholl*, under sect. 56, sub-s. 3, of the *Settled Land Act*, 1882, praying for the opinion, advice, and direction of the Court on the questions below stated.

The statements in the petition were as follows, or to the following effect:—

1. The late *Walter Francis* Duke of *Buccleuch* and *Queensberry* by his will dated the 8th day of August, 1883, limited and appointed the castle and honor of *Clitheroe* in the county of *Lancaster*, and all other the manors, messuages, lands, tenements and hereditaments in the same county, described and referred to as "the *Clitheroe* estate," to the use of the Petitioners for the term of 1300 years from the testator's decease, without impeachment of waste, upon and for the trusts and purposes thereinafter expressed; and from and after the expiration or sooner determination of the same term to such and the same uses, other than the use in favour of his wife, as were in his said will previously declared concerning his *Ditton* estate; that is to say, to the use of his second son, Lord *Henry John Montagu Douglas Scott* during his life, without impeachment of waste, with remainder to the use of the first and other sons of the said Lord *Henry Scott* successively according to priority of birth, in tail male, with divers remainders over. And the testator directed that in the event of the said Lord *Henry Scott* becoming entitled in possession to the said testator's entailed estates of *Buccleuch* and *Queensberry* in *Scotland*, or either of them, then the estate for life of Lord *Henry Scott* and the limitations thereby made to his sons successively in tail male in the *Clitheroe* estate should cease and determine.

2. The testator declared and appointed that the Petitioners should hold the *Clitheroe* estate for the said term of 1300 years, upon the trusts and for the purposes following (that is to say):—

(1st.) To raise by mortgage, sale, or otherwise for Lord *Walter*

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Scott his third son, and Lord *Charles Scott* his fourth son, and his three daughters, the Marchioness of *Lothian*, Lady *Margaret Cameron*, and Lady *Mary Trefusis*, portions amounting together to £76,000, with interest from his death at 5 per cent. per annum.

(2nd.) To pay out of the rents and profits to the trustees of Lady *Mary Trefusis*' marriage settlement £500 a year, and also to make up the interest on a sum of £10,000 charged on the Scotch estates to 5 per cent. per annum, and to pay from his decease interest at 5 per cent., in lieu of 4 per cent. per annum, on a portion of £40,000 charged on the *Clitheroe* estate in favour of Lord *Walter Scott*.

(3rd.) To set apart out of the rents and profits by way of further income for the possessor for the time being of the *Beaulieu* estate, which stood settled to Lord *Henry Scott* for life, with remainder to his sons successively in tail male, with divers remainders over, £6000 a year, until the mortgage debts after mentioned of £25,000 and £20,000 should be discharged under the trusts of the said term; and £8000 a year after the discharge of the said mortgage debts until the termination of all the other trusts of the said term.

(4th.) To accumulate the surplus of the rents and profits of the *Clitheroe* estate as a sinking fund for the discharge of the following debts and charges, and in the following order, namely:—

(i.) Two mortgage debts of £25,000 and £20,000 respectively, charged on the testator's *Barnwell* and *Ditton* estates.

(ii.) The said portion of £40,000 charged on the *Clitheroe* estate in favour of Lord *Walter Scott*, and any portions for children of Lord *Henry Scott* which might become payable under an indenture of the 31st day of July, 1865, referred to in the will, and the said portions amounting to £76,000 for the third and fourth sons and the three daughters of the testator.

3. The testator further directed that the petitioners should, upon his decease, "enter into and from thenceforth and during the continuance of the trusts for the liquidation and extinction of debts and charges hereinbefore created, hold the possession or receipt of the rents and profits of" the *Clitheroe* estate, "and not deliver the same to any person beneficially interested in any part thereof," and manage or superintend the management of the same

estate, with full powers according to their discretion to do a variety of acts therein specified—as to fell timber, to direct or allow repairs or improvements, to insure, to open mines or quarries, to appoint receivers and stewards, to defray costs and expenses in priority to other charges, to continue donations or annual subscriptions which the testator had been in the habit of making for building churches and schools, and to make similar donations or subscriptions; And the testator declared and appointed that "when all the trusts hereinbefore declared concerning the said term of 1300 years shall have been fully performed or satisfied," and the trustees' costs paid, "the said term of 1300 years shall cease."

4. The testator further directed and appointed that it should be lawful for each of his said younger sons, the said Lord *Henry Scott* and two others, "as and when he shall be entitled as tenant for life in possession under this my will to my said *Clitheroe* estate hereby settled, after the determination of the said term of 1300 years, and the trusts thereof," and also for the Petitioners during the continuance of the said term of 1300 years and the trusts thereof, and also during the minority of any and every person who, if of full age, would be entitled to the same estate as tenant in tail male in possession under the will, after the determination of the said term of 1300 years, and the trusts thereof, from time to time to give and grant in fee simple, discharged from such term and all the trusts thereof, and from all other the uses, trusts, and provisions of the will, any plot or plots of land, parcel of the *Clitheroe* estate, not exceeding in each separate instance one acre, as sites for any Church of *England* schools, and the buildings connected therewith. And the testator also directed and appointed that, during the continuance of the said term of 1300 years, and the trusts thereof, the Petitioners "shall have such other powers over my said *Clitheroe* estate as are given to a tenant for life in possession by the *Settled Land Act*, 1882, and as extended by this my will."

5. The testator further empowered Lord *Henry Scott* to appoint to his present or any future wife a jointure not exceeding £1000 a year, chargeable on the *Clitheroe* estate or any part thereof, and also to charge the *Clitheroe* estate, or any part thereof, with

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portions for his younger children, not exceeding in the whole £15,000, such jointure and portions to be in addition, if the said Lord *Henry Scott* should so think fit, to the jointure and portions already charged upon the *Clitheroe* estate by the said indenture of the 31st day of July, 1865, and to be chargeable upon and raisable out of the hereditaments to be charged therewith, immediately after the said annual allowance thereby directed to be made out of the rents and profits of the *Clitheroe* estate to the possessor of the said *Beaulieu* estate for the time being, and so to have precedence over the trusts thereinbefore declared for the application of the surplus profits of the *Clitheroe* estate to the liquidation of debts.

6. The testator appointed the Petitioners to be the trustees of his said will "for all the purposes of the *Settled Land Act*, 1882, and also for all the purposes of sect. 42 of the *Conveyancing and Law of Property Act*, 1881, and appointed his eldest son, the present Duke of *Buccleuch* and *Queensberry*, and the Petitioner, *James Archibald Douglas Home*, to be executors of his said will.

7. The testator died on the 16th of April, 1884, and his will was on the 30th day of October, 1884, duly proved by the executors.

8. The Petitioners on the death of the said testator entered into possession of the *Clitheroe* estate pursuant to the directions of the will, and were now in the receipt of the rents and profits thereof. The net rents and profits of the estate fluctuated from year to year, but had amounted during the last five years to an average of about £26,000 a year, and the debts and charges directed to be liquidated under the trusts of the term of 1300 years amounted to a principal sum exceeding £160,000, in addition to the yearly sums payable out of the rents and profits under the will and the indenture of the 31st day of July, 1865. The Petitioners reckoned that the trusts and purposes of the term would require for their accomplishment, in pursuance of the directions of the will, a period of from fifteen to twenty years.

9. The Petitioners were advised that until the term of years had ceased and determined by reason of the trusts being fully performed and satisfied, Lord *Henry Scott* was to be deemed an annuitant out of the rents and profits of the *Clitheroe* estate, and

not a tenant for life, or a person having the powers of a tenant for life, within the meaning of the *Settled Land Act*, 1882; and that the Petitioners were entitled, during the continuance of the term and the trusts thereof, to exercise without the consent of any other person the powers given to them by the will, including the powers given to a tenant for life in possession by the *Settled Land Act*, 1882, as extended by the will.

10. In pursuance of the trusts, and in exercise of the powers declared by the will, and in accordance with sect. 3, sub-sect. 2 of the *Settled Land Act*, 1882, the Petitioners had agreed with the tenants of divers copyhold hereditaments forming part of the *Clitheroe* estate for the sale to them of the freehold and inheritance of the copyholds so as to effect an enfranchisement thereof.

11. It had been objected by some of the said intending purchasers of the freehold of the copyhold hereditaments that Lord *Henry Scott* had, by virtue of the *Settled Land Act*, 1882, the powers of a tenant for life under the Act, and that, under and by virtue of the 2nd sub-section of the 56th section of the Act, the consent of Lord *Henry Scott* was necessary to the sale by the Petitioners of the freehold of the said copyholds, and to the exercise by the Petitioners of any power conferred upon them by the said will for any purpose provided for in the said Act, ["and the said Lord *Henry Scott* has declared that he intends to exercise over the *Clitheroe* estate the powers given to a tenant for life under the said Act."]

The last clause in the last paragraph was an insertion by amendment, suggested by the Court in the course of the argument.

The questions on which the opinion, advice and direction of the Court were prayed, were:—

1. Whether your Petitioners as trustees of the said term of 1300 years in the *Clitheroe* estate are, or are not, entitled, during the continuance of the said term, to sell the freehold of the said copyhold hereditaments, and generally to exercise the powers expressed to be conferred on them by the said will for any purpose provided for in the *Settled Land Act*, 1882, without the consent of the said Lord *Henry Scott*.

2. Whether the said Lord *Henry Scott*, during the continuance of the trusts of the said term of 1300 years, is to be deemed a

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tenant for life or a person having the powers of a tenant for life of the *Clitheroe* estate within the meaning of the *Settled Land Act*, 1882.

Spencer Butler, for the Petitioners:—

Upon the first question, it is submitted that Lord *Henry Scott's* consent is not necessary to the exercise by the trustees of the powers contained in the settlement; and upon the second question, that Lord *Henry Scott* is not a person who has (sect. 58, sub-sect. 1) the powers of a tenant for life under the Act.

First, the powers of enfranchisement and sale which the trustees are seeking to exercise are powers which the statute itself (sect. 3 (ii.)) confers upon a tenant for life. But this settlement gives these powers to the trustees; thereby shewing that the settlor, who was aware of the provisions of the Act, had no intention of creating a tenancy for life in the estates. It will scarcely be contended that the settlor has, involuntarily and in spite of his own intention, created a tenancy for life; but if the Court should so hold, there are, at any rate, concurrent powers of enfranchisement and sale vested in the Petitioners; for the Act does not take away from trustees any powers given by the settlement: *In re Duke of Newcastle's Estates* (1).

Further and secondly, it is submitted that there is no tenant for life at all in this case. The trusts of the term are inconsistent with the existence of a tenancy for life. The trustees are to take the whole of the rents and profits, and apply them upon certain declared trusts. Lord *Henry Scott* is, in fact, a mere annuitant until the trusts of the term are fully performed and satisfied. He cannot, by possibility, until that period arrives, be considered "a tenant for life in possession." But then, it may be said, he is a person who, under sect. 58, sub-sect. 1, has the powers of a tenant for life under the statute, "as if" he were "a tenant for life as defined in" the Act; and it may be argued that he is a person "entitled to the income of land" under sub-division ix. of the same sub-section; and that, according to the ruling in *In re Jones* (2), he is to be held to be such a person, though the income he gets from the estate is *nil*, or nearly so. But there is this

(1) 24 Ch. D. 129, 138. (2) 24 Ch. D. 583.

difference in the two cases, that in *In re Jones* (1) the balance or ultimate residue of the rents was made payable to the person who claimed to be tenant for life. Here nothing is payable to the person claiming to be tenant for life but an annuity, and the ultimate balance is made payable to the trustees. There is not any "trust or direction for payment of the income" to Lord *Henry Scott* during the continuance of the term, within sub-division ix. It follows therefore, that his consent is not necessary under sect. 56, sub-sect. 2, to the exercise by the trustees of the powers conferred by the settlement, and that he is not tenant for life, either under the settlement or under the statute: *In re Hazle's Settled Estates* (2).

Reginald J. Cust, for Lord *Henry Scott*:—

It may be a question how far the decision, or an expression of the opinion, of the Court, will be binding on strangers, as for example, purchasers; but the question is nevertheless submitted under sub-sect. 3 of sect. 56, and is one of great importance to the parties.

It has been argued that Lord *H. Scott* is not a tenant for life beneficially entitled in possession because he is an annuitant; but he is not the only annuitant. Then there is a clause of cesser; and the fact of such a clause being inserted is of importance, as shewing the intention which must govern the construction of the will, namely, that the term is a security only for the fulfilment of certain specified objects. Suppose the tenant for life were to pay off all the charges to-morrow, the term would then be at an end. The charges, it is true, amount to more than £160,000, but there is £26,000 a year wherewith to pay them off.

It has been argued, first, that there is a manifest intention in the will that Lord *H. Scott* should not be tenant for life. To that the answer is—first, that there is no evidence of such intention. The testator was quite aware of the existence of the *Settled Land Act*, 1882, and refers to it; and further, if such intention existed, it cannot prevail against the express enactments of the statute. Under the *Settled Estates Act*, 1877, the Court follows the terms of the settlement, but under the *Settled Land Act*, 1882,

(1) 24 Ch. D. 583. (2) 26 Ch. D. 428.

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a testator cannot control the action of the Court, which must follow the Act of Parliament. In this instance, the testator appoints trustees from the date of his death, and the fact of their appointment implies the existence of a tenant for life. If the will had contained an express declaration that the Act should not operate, that would have been of no avail against the statute. If Lord *H. Scott* can be brought within the definition of a tenant for life, no conveyancing device will exclude the exercise of his powers: sect. 51, sub-sect. 1. If, as has been contended (but as is not admitted) there was such an intention, it cannot prevail.

Secondly, it was argued that the trusts of the lease are inconsistent with the existence of a tenant for life. It may be that they are inconsistent; but if so, the inconsistency is provided for by the statute. "Incumbrances" and "charges" are expressly mentioned in sub-sect. 7 of sect. 2. So that Lord *H. Scott* is tenant for life, even though the estate should be in the hands of mortgagee or of a receiver. "A trust for accumulation of income for payment of debts or other purposes," which occurs here, is provided for by sub-division vi. of sub-sect. 1 of sect. 58. Nothing at first sight can be more inconsistent with a tenancy for life in possession than the powers of management in this will; but powers of management are provided for by sub-division ix. of the same sub-section. It may be said that the person claiming to be tenant for life gets nothing; but that point is disposed of by the decision in *In re Jones* (1), where the head-note would have been more correct in stating that "no annual surplus" instead of "only a very small annual surplus" remained payable to the applicant, Col. *Grey* (2), though Lord Justice *Lindley*, spoke of it as "a paradox." But it may be observed that in sect. 2, sub-sect. 10, sub-division i, the Act says, that income "includes," not that "it is," rents and profits—and that possession "includes," not that it is, receipt of income. It is contended that it goes further, and includes persons who are not in receipt of income. Then as to the word "beneficially" in sub-sect. 5 of sect. 2; it is contended that it means "otherwise than as trustee." A tenant for life is "beneficially" entitled when whatever he gets, if he gets anything, belongs to himself, and not to some one else. Then

(1) 24 Ch. D. 583. (2) S. C. on appeal; 26 Ch. D. 736.

what is the meaning of "entitled to possession"? It means entitled "otherwise than in reversion, or expectancy" (1). It does not necessarily mean actual perception of rents and profits. Trusts for management may destroy possession, but they do not destroy the *status* of tenant for life. This, though an apparently forced construction, has been recognised by conveyancers. In precedents of marriage settlements, after the power of jointuring, comes a proviso that no jointure which may be appointed "shall become a lien upon the said premises, . . . or be payable, unless either the person appointing the same shall be or become entitled to the possession or the receipt of the rents and profits of the said premises, or some issue of such person shall become, or if of full age would have become, so entitled:" *Davidson's* Conveyancing (2). That means that a person must be "in possession" before he can jointure a wife; it does not mean that if a mortgagee is in possession, the person cannot jointure a wife, or if the person is bankrupt that he cannot jointure—it only means that a person entitled in reversion cannot jointure.

Thirdly, it has been contended that Lord *Henry Scott* is not within the definition of a tenant for life, as prescribed by the Act. But this construction of the statute was solemnly adopted by this branch of the Court and by the Court of Appeal in *In re Jones* (3). The expression in sect. 58, sub-sect. 1, "when the estate or interest of each of them is in possession," governs all the rest of the sub-section. It means when all the prior estates have determined.

If the above three points are established—first, that no exercise of intention can override the statute; secondly, that if there be an inconsistency, it is provided for by the statute; thirdly, that the interpretation of the statute has been decided by the harmonious, exhaustive, and critical judgments of the Judges in *In re Jones*, the case of Lord *Henry Scott* is established.

In re Chaytor's Settled Estate Act (4) shews that the power of sale conferred by the Act of 1882 on a tenant for life overrides a power given to trustees by a private Act of Parliament. The case of *In re Hazle's Settled Estates* (5) merely decides that a

(1) 26 Ch. D. 741.
(2) 2nd Ed. vol. iii. p. 933.
(3) 24 Ch. D. 583; 26 Ch. D. 736.
(4) 25 Ch. D. 651.
(5) 26 Ch. D. 428.

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legatee for a term of years if he should so long live, is not a tenant for life.

BACON, V.C.:—

I do not think that decision has any application to the present case.

I have not yet heard that there is any "conflict" between the provisions of this will and the provisions of the Act, relative to any matter in respect whereof the tenant for life "intends to exercise any power" under the Act within the words of sub-sect. 2 of sect. 56. Suppose the trustees contract to sell, and the tenant for life does not object, then no conflict arises.

Cust:—Though not an actual, there is a legal conflict. When there is (as it is argued there is here) a tenant for life capable of exercising these powers, and the powers of a tenant for life have been, as here, expressly given to the trustees, both parties may sell on the same day, and a purchaser may have to choose between two conflicting vendors.

BACON, V.C.:—

With that I have nothing to do. All I have to do is to decide between Lord *Henry Scott* and his trustees. Where is the statutory conflict? I have heard no statement that Lord *Henry Scott* has exercised, or has contracted or intends to exercise, any power under the Act.

Cust having on behalf of Lord *H. Scott* declared he did intend to exercise the powers; the petition was (by consent of both parties) amended by inserting the clause above mentioned.

Butler, in reply:—

The case has been argued as if it were the policy of the statute always to establish a person who shall be a tenant for a life in possession, no matter how the settlor may have chosen to frame the settlement. But this policy is not to be found stated in the Act. The policy of the Act, as stated in its title, is not avoided by giving to trustees, during a limited period, these powers, until Lord *Henry Scott* himself becomes beneficially entitled to the

possession. The argument on the other side introduces a new definition into the Act of Parliament, namely that "entitled to possession" means "entitled otherwise than in reversion." Your Lordship's definition in *In re Jones* (1) is preferable to this; and if definitions outside the Act are to be introduced into it, a flood of litigation will be let loose. The practice of conveyancers has very little to do with the matter. A decision of *Vine* v. *Raleigh* (2), under the *Settled Estates Act*, 1877, is more to the point. There an estate was vested in trustees, and there was not for the time being any beneficial owner of the rents and profits. In *In re Jones*, if there had been any surplus, Col. *Grey* would have taken it; in this case the surplus is expressly given away from Lord *Henry Scott* to the trustees. This circumstance entirely distinguishes *In re Jones*, and the argument founded upon that case consequently falls to the ground. The Court will give full weight to the testator's declared intention, if not contrary to the policy of the Act. It is not, as has been contended, necessary to a settlement that there should always be a tenant for life entitled in possession.

Jan. 27. BACON, V.C.:—

The question which in this case is submitted for the opinion of the Court may be shortly stated to be whether or not the trustees of the will of the late Duke of *Buccleuch* are, of their own mere power and authority derived from that will, competent to sell a part of the devised trust estate, or whether they can only exercise that power with the consent of Lord *Henry Scott;* the trustees insisting upon the affirmative of that proposition, and Lord *Henry Scott* denying that they are competent to sell as they desire and intend, unless he shall consent to their so doing.

It appears from the course which the argument has taken that the question mainly depends upon the construction of the 56th section of the *Settled Land Act*, 1882. That statute, which has introduced very extensive and important changes in the law relating to the rights over and interests in land, requires, as well by reason of its novelty as of its importance, the utmost vigilance and attention in considering and determining its effect and

(1) 24 Ch. D. 583. (2) 24 Ch. D. 238.

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operation. Its general scope is to remove the impediments which previously existed to the alienation of land, and its particular effect is to enable tenants for life of settled land to sell, partition, lease, and otherwise dispose of settled land, freed from the restrictions which, by the general law previously existing, and by the numerous statutes applicable to the subject, had up to the time of passing the Act prevented tenants for life from so dealing with settled land. The petition states so much of the will of the late Duke, which was made after the passing of the *Settled Land Act*, 1882, as relates to his *Clitheroe* estate, and contains a distinct reference to that Act; and the will has been duly proved by the executors. [His Lordship then read the several paragraphs of the petition from 7 to 11, set out above, and continued:—]

Upon the argument which has ensued, and which has been very elaborately and ably conducted by the counsel on either side, it has been contended, on behalf of the trustees, that the power of sale under the will is not only absolute in its terms and effect, but that Lord *Henry Scott* is not a tenant for life in possession of the *Clitheroe* estate, either under the general provisions of the statute or, in particular, under the 58th section of the statute, comprised in Part XIII., which relates to "limited owners generally;" and relying upon the direction in the will that the trustees should hold possession or receipt of the rents and profits of the *Clitheroe* estate "and not deliver the same to any person beneficially interested in any part thereof" during the continuance of the term, they (the trustees) contend that in the meantime Lord *Henry Scott* is to be deemed an annuitant only out of the rents and profits of the estate, and not a tenant for life in possession, or person having the powers of a tenant for life within the meaning of the Act.

On the other hand, it is insisted, on the part of Lord *Henry Scott*, that under the general powers of the statute he is tenant for life in possession, subject to the charges created by the will; that the direction therein contained, by which the possession of the land and the receipt of rents and profits by the trustees are conferred on them for the purposes of the will, cannot affect the statutory title under which he claims; and that, under the express enactment of the 56th section, no sale can be made by the trustees

without his consent; and he further relies in support of his contention upon the decision of the Court of Appeal in *In re Jones* (1).

It appears, therefore, clear, under these circumstances, that the case contemplated under the 56th section of the Act has arisen. The trustees desire to exercise their power of sale "under the provisions of the settlement." The tenant for life intends to exercise the power of sale alleged to have been given him by the statute, and declines to consent to the exercise by the trustees of their power to sell, and the question having thus arisen is, under the 3rd sub-section of sect. 56, properly submitted for the decision or direction of the Court.

In considering and answering this question, and in order to ascertain, in the first place, what are the *status*, power, and right of the tenant for life, recourse must be had to the terms of the statute. The Act, having defined in sect. 2 what is a "settlement" and what is "settled land" for the purposes of the Act, enacts (sub-sect. 5), that "the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for the purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." And sub-sect. 7 declares that the tenant for life thus defined "shall be deemed to be such, notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." And, moreover, by sub-sect. 8, persons possessing a power of consent to or approval of the exercise of a power of sale under the settlement are declared to be, for the purposes of the Act, trustees of the settlement; and by sect. 53 a tenant for life is to have regard to the interests of all parties entitled under the settlement, and so have the duties and liabilities of a trustee for those parties. It is unnecessary that I should proceed to enumerate the acts which may be done by the tenant for life and the manner in which they may be done, and the provisions for the protection and application of the proceeds of sale. By sect. 44 the Court may decide differences between the trustees and the tenant for life,

(1) 26 Ch. D. 736.

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and by sect. 45 the tenant for life must give a month's previous notice of his intention to exercise his powers.

It is not necessary that I should on this occasion express any opinion of my own upon the statute—first, because I have already done so in effect in the case of *In re Jones* (1); and for a much better reason—viz., because the Court of Appeal have decided conclusively in the same case (2) that the tenant for life of an estate in land vested in and in the possession of trustees, and so heavily charged that the tenant for life had received nothing and there was no prospect of his receiving anything for many years, was nevertheless entitled under sect. 58 of the Act to exercise the power of sale given by the Act to tenants for life. The authority of that case is, I need not say, binding on me; but I cannot help adding that it is also extremely useful and valuable, because the learned Judges by whom the case was decided there made an elaborate and critical examination of the provisions of the statute, by which a safe guide is furnished for the determination of any similar questions which may hereafter arise. The Court of Appeal was pressed on behalf of the trustees with the argument that the tenant for life was called in the statute a person "entitled to the income of the land," and that, in fact, there was no income and therefore there could be no tenant in possession; but to this it was answered by one of the learned Judges, that a person "beneficially entitled to the receipt of income from the settled land during his life, is for the purposes of this Act to be deemed to be tenant for life of that land, notwithstanding the property has been charged or incumbered to any extent whatever" (3). In the present case the trustees reckon that at the end of fifteen or twenty years, by rents and profits, the whole of the incumbrances will be discharged.

[His Lordship referred to the remaining part of the judgment of Lord Justice *Baggallay*, and read also the judgments of Lord Justices *Cotton* and *Lindley*, and continued:—]

As I have said, I treat that as not only a binding decision, but as being a clear decision on the points argued before me on

(1) 24 Ch. D. 583. (2) 26 Ch. D. 736.
(3) 26 Ch. D. 740.

behalf of the trustees, namely, that under sect. 2 Lord *Henry Scott* is not a tenant for life, and that under sect. 58, which relates to the powers, he is not a tenant for life in possession. Both of these points I think are clearly and distinctly decided.

In my opinion I must decide that the contention of the trustees cannot be maintained. Under the 2nd section—at all events, under the 58th section—Lord *Henry Scott* has an interest in possession, "incumbrances" (in the language of Lord Justice *Cotton*) "not preventing its being so, but only subjecting that interest, which is in possession and not in remainder, to certain prior charges" (1). As a consequence, I decide that Lord *Henry Scott* is not to be deemed an annuitant only out of the rents and profits of the *Clitheroe* estate; and I must answer the case by saying (the amendment I have referred to having been made), taking the second question first—that Lord *Henry Scott* is during the continuance of the trusts of the term of 1300 years to be deemed a tenant for life, or a person having the power of a tenant for life, of the *Clitheroe* estate within the meaning of the Act; and, secondly, that the trustees of the term are not entitled during its continuance to sell the estate, or exercise the powers of the will for any purpose provided for by the Act, without the consent of Lord *Henry Scott*.

It was stated to have been arranged that the costs of the application should be paid out of the estate.

Solicitors: *Nicholl, Manisty, & Co.*

(1) 26 Ch. D. 742.

J. B. D.

CHITTY, J.

1885

Feb. 6.

BARNEY *v.* UNITED TELEPHONE COMPANY.

[1884 B. 5829.]

Patents, Designs, and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Threat of Legal Proceedings—Injunction—Infringement.*

On motion under the *Patents, Designs, and Trade-marks Act*, 1883, s. 32, to restrain the publication of advertisements warning the public that the invention claimed by the applicant is an infringement of patent rights claimed by the advertisers, and that all necessary proceedings will be taken to protect such rights should any attempt be made to manufacture or supply the invention claimed by the applicant, the applicant, as a condition precedent to obtaining an injunction, must shew that there has been no infringement on his part. And if in opposition to the motion a case of alleged infringement is raised by the respondents' affidavits, an injunction will not be granted, although the respondents decline to take legal proceedings in respect of such alleged infringement against the applicant.

MOTION on behalf of the Plaintiff for an injunction to restrain the Defendant company from issuing any notice, advertisement, or circular containing any allegation that the *Boult* telephone, the property of the Plaintiff, was an infringement of the Defendant company's patent rights, or any warning against buying, selling, manufacturing, or dealing with such telephone, or any threat of proceedings against any person buying, &c., or from doing any other act or thing to prejudice the sale or manufacture of the said telephone.

The Defendant company were the owners of *Edison's* patent and *Bell's* patent, and had succeeded in obtaining numerous injunctions against infringers of these patents, and several actions in respect of infringement were still pending.

They had also from time to time issued notices warning the public against infringing their patent rights.

The Plaintiff, who described himself as a retired major in the *United States* army, had, in conjunction with a Mr. *Boult*, a patent agent, who claimed to be the inventor by communication from *America* of a telephone transmitter and receiver known as the "*Boult* telephone," obtained provisional protection in May, 1884, for the invention; and it was agreed that *Boult* and the Plaintiff,

by the authority and on behalf of the American inventor, should sell in this country the invention and the patent when obtained.

Advertisements had been issued by the Plaintiff that "*The Telephone and Electric Manufacturing Company*" were "prepared to supply telephone transmitters and receivers made under *Boult's* patent free from infringement of any other patent," and possessing certain specified advantages.

The Defendant company having been advised that the instruments thus advertised were infringements of their patents, and not being disposed to bring an action against the Plaintiff, whom from inquiries made they regarded as a man of straw, had on the 24th of October, 1884, issued an advertisement in the *Standard* headed: "Telephone Infringements," and stating, "The directors feel it their duty to warn the public that they are advised that the valve telephone is an infringement of the patent rights owned by the *United Telephone Company*, and the company's solicitors have been instructed to take all necessary proceedings to protect these patent rights should any attempt be made to manufacture or supply the valve telephone. The directors take this opportunity of giving a similar warning with respect to the *Boult* telephone recently advertised by some person trading under the name of '*The Telephone and Electric Manufacturing Company.*'"

A correspondence followed, in the course of which the Plaintiff's solicitor desired to know wherein the Plaintiff's instruments resembled the property of the company, to which the company's solicitors replied that their advisers were satisfied that such instruments were an infringement of the company's patent rights, being constructed and operating substantially in the same manner as the inventions described and claimed in *Bell's* and *Edison's* patents.

The company's solicitors also wrote that they did not propose to make the Plaintiff sole Defendant in any litigation, as they did not believe he was in a position to pay either damages or costs, their instructions being to take proceedings as soon as they found a substantial person (able to pay costs) who had infringed the company's patents.

In these circumstances the Plaintiff had brought this action, and now moved for an injunction under the *Patents, Designs, and Trade-marks Act*, 1883, s. 32.

CHITTY, J.
1885
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COMPANY.

In their joint affidavit in support of the motion, the Plaintiff and *Boult* stated that to the best of their belief, and in their opinion, the *Boult* telephone was not an infringement of any patent rights of the Defendant company, "and in particular that it was not an infringement of the *Edison* or *Bell* patents." They also stated what were alleged to be essential and substantial differences between the instruments.

This statement was directly traversed by the company, who stated, by their engineers, that the results obtained were substantially the same as those obtained by *Edison's* and *Bell's* patents, and produced by practically the same means.

H. C. Richards, in support of the motion :—

We are entitled to an injunction under sect. 32. Publication by the Defendants of the advertisement complained of is undoubted, and the loss and damage sustained by the Plaintiff thereby are also undoubted. The Defendants, when challenged, have refused to point out in what way the Plaintiff is alleged to be infringing their patent; they have declined to discontinue their advertisement, and have declined to have the question of alleged infringement decided by taking proceedings against the Plaintiff.

[CHITTY, J. :—In substance they say that they will not sue a man of straw, and they assert that the instrument sold by you is an infringement of their patents. It is incumbent on you to establish that there is no infringement as a condition precedent to obtaining an injunction.]

The Plaintiff's affidavit states distinctly that the telephone sold by him is not an infringement of any patent rights owned by the Defendant company.

[CHITTY, J. :—That will not do. Evidence is given on the other side that you are infringing.]

The Defendants are bound by sect. 32 to commence and prosecute an action for infringement, and as they decline to take proceedings against us they ought, while the Plaintiff's action is pending, to give an undertaking not to issue the advertisement.

Aston, Q.C., and *Alfred Back*, for the Defendant company, were not called on.

CHITTY, J. :—

Sect. 32 of the Act of 1883, under which this motion is made, contains this condition :—"if the alleged manufacture . . . to which the threats related was not in fact an infringement of any legal rights of the person making such threats." In this case there appears to be a serious question between the parties whether the instrument sold by the Plaintiff is an infringement or not of the Defendant company's patent rights. There is a conflict of affidavits upon the point, and therefore the question is one which the Court cannot decide on this motion. As the Plaintiff is not able to prove that there is not in fact any infringement of the Defendant company's rights—which is a condition precedent to his obtaining an injunction—the motion must be refused.

Solicitors: *William Whitfield; Waterhouse, Winterbotham, & Harrison.*

F. G. A. W.

NORTH, J.
1884
Nov. 14.

CARLISLE BANKING COMPANY *v.* THOMPSON.

[1883 C. 2970.]

Building Society—Reconveyance—Indorsed Receipt—Priority—37 & 38 Vict. c. 42, s. 42.

A piece of land was mortgaged to a friendly society, and by way of second mortgage to a banking company. A building society agreed to pay off the first mortgage, and to make a further advance, having no notice of the second mortgage. Accordingly by a deed indorsed on the first mortgage deed, the first mortgagees reconveyed to the mortgagor; and by another deed he conveyed the land to the building society to secure the repayment of the sum paid to the first mortgagees, and the further advance:—

Held, that as the legal estate had passed by a reconveyance and not by a receipt under 37 & 38 Vict. c. 42, s. 42, it was vested in the building society, and gave them priority over the second mortgagees.

Robinson v. *Trevor* (1) distinguished.

ON the 12th of November, 1873, *Robert Thompson* made to the trustees of a society, shortly called the *Brampton Friendly Society*, a mortgage of a piece of land in *Cumberland* for £450.

On the 1st of February, 1882, he mortgaged the land to the *Carlisle Banking Company* to secure any balance due from him to the banking company. The banking company gave notice to one of the trustees of the friendly society, who appeared to have forgotten all about it.

Thompson had previously been in treaty with the *Enterprise Building Society* for a transfer of the mortgage held by the *Brampton Friendly Society* with a further advance; and shortly before December, 1882, a clerk of the solicitors of the *Enterprise Building Society* went to the office of the *Brampton Friendly Society* and asked if there was any incumbrance on the land besides that of the *Brampton Friendly Society*. He saw two trustees, one of whom was the trustee who had received the notice of the banking company, and he also saw some official of the friendly society, and he was told that there was not any other incumbrance.

The *Enterprise Building Society* then advanced to *Thompson*

(1) 12 Q. B. D. 423.

£1170, taking a security for £1200 as follows. By an indenture indorsed on the deed of 1873, and dated the 12th of December, 1882, purporting to be made by way of statutory reconveyance between the trustees of the friendly society of the one part, and *Robert Thompson* of the other part, it was witnessed "that in consideration of all principal money and interest due under the within written indenture having been paid (of which principal and interest the trustees hereby acknowledge the receipt) the trustees as mortgagees hereby convey to the said *Robert Thompson* all the lands, messuages, and hereditaments now vested in the trustees under the within written indenture, To hold the same unto and to the use of the within named *Robert Thompson* in fee simple, freed and discharged from all principal money and interest secured by and from all claims and demands under the within written indenture." The indenture was signed, sealed, and delivered by the three trustees, and the execution was attested by a witness.

Two days later another deed was executed by which *Thompson* conveyed the land to the *Enterprise Building Society* as a security for the £1200 paid, as to £463 to the *Brampton Society* and as to the balance to *Thompson*.

Thompson went into liquidation, and the *Carlisle Banking Company* brought this action against *Thompson's* trustees in the liquidation and against the *Enterprise Building Society* claiming (amongst other things) priority over the society's mortgage for the mortgage to the banking company.

W. W. Karslake, Q.C., and *Jason Smith*, for the *Carlisle Banking Company*:—

The deed indorsed on the mortgage deed though in form a reconveyance must, being by a friendly society, have the same effect as their proper form of reconveyance under 38 & 39 Vict. c. 60, s. 16, sub-s. 7, viz., a receipt; and then the legal estate goes to those who have the best right to it: *Pease* v. *Jackson* (1); *Robinson* v. *Trevor* (2). The banking company therefore, have a right to it, subject only to the original £450 and interest: *Otter*

(1) Law Rep. 3 Ch. 576. (2) 12 Q. B. D. 423.

NORTH, J. 1884 CARLISLE BANKING COMPANY v. THOMPSON.

v. *Lord Vaux* (1). Besides, under the circumstances the building society must be held to have had notice of our charge.

Barber, Q.C., and *Darley*, for the *Enterprise Building Society* cited *Peacock* v. *Burt* (2).

Farwell, for the trustees of *Thompson*.

Karslake, in reply.

NORTH, J. (after stating the facts of the case, and deciding that in making the inquiry of the trustees of the friendly society the building society had done all that was necessary, and had no notice of the mortgage to the banking company; and deciding a question as to the employment of a solicitor; and that there had been no negligence proved against the building society, proceeded:—)

Then the remaining point is a question of law, and it is this. It is said that there are certain cases which decide that if this reconveyance had been effected not by a regular reconveyance to the mortgagor, but by the execution of a statutory receipt indorsed upon the mortgage deed, and executed in a particular form, then the result would have been, according to the decisions, that the legal estate would have passed in such a way as to give the *Enterprise Building Society* a charge for a certain amount and no more, and to make the banking company second mortgagees subject only to the charge of £450 and interest. No doubt statutory receipts under the Act of Parliament relating to building societies have been decided to have certain legal effects, and I need hardly say that if these decisions applied to the present case I should follow *Pease* v. *Jackson* (3) and *Robinson* v. *Trevor* (4). But in the present case there is no such receipt. There is what is called a statutory reconveyance, but that does not take effect under the *Friendly Societies' Act*; and although the reconveyance does in the body of the deed contain a receipt, it is not executed in the way in which the Act requires that such

(1) 6 D. M. & G. 638.
(2) 4 L. J. (Ch.) (N.S.) 33.
(3) Law Rep. 3 Ch. 576.
(4) 12 Q. B. D. 423.

a receipt should be executed in order to give it any peculiar statutory efficacy in transferring the legal estate.

The case, then, is simply this. There is a mortgage to the Plaintiff, which is prior in date to the mortgage to the Defendants, which was made partly to secure a former debt, and partly for a further advance; but both sums are advanced on the security of the legal estate conveyed by the mortgagor to the Defendant mortgagees, without any notice express or otherwise of the existence of the Plaintiffs' prior mortgage. Under these circumstances it appears to me clear that the mortgage to the *Enterprise Building Society* has priority, and a declaration must be made to that effect; and the action as against the *Enterprise Building Society* will be dismissed with costs.

Solicitors for Plaintiffs: *Lewty & Bendle*, for *J. Bendle, Carlisle.*

Solicitors for Defendants: *Gray & Mounsey*, for *J. C. Wannop, Carlisle; Pritchard, Englefield & Co.*, for *Rycroft & Pickup, Manchester.*

C. M.

PEARSON, J.
1884
Dec. 5, 19.

MILFORD HAVEN RAILWAY AND ESTATE COMPANY *v.* MOWATT.

[1884 M. 4005.]

In re LAKE & TAYLOR'S MORTGAGE.

[1884 L. 2254.]

SPAIN *v.* MOWATT.

[1884 S. 5172.]

Practice—Payment into Court—Mortgage—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.

A mortgage deed gave the mortgagee an option to purchase in case the debt was not paid on a day named. The trustees in bankruptcy of the mortgagors sold the mortgaged property. A part of the purchase-money was deposited to provide against the mortgage. Pending proceedings on the part of the trustees to set aside the mortgage on the ground of fraudulent preference, an order was made that the money deposited should be paid into Court, and on such further sum being paid in as would cover the principal and interest due, and 10 per cent. extra, the mortgaged property should vest in the purchaser.

MESSRS. *S. LAKE & T. W. TAYLOR*, contractors, executed a mortgage dated the 15th of December, 1882, of certain shares they were entitled to under a syndicate agreement, in an agreement for a lease for twenty-one years of the *Milford Haven Railway Harbour and Pier*, and other property, and in a lease for 999 years of a property known as the *Milford* estate, to *Francis Mowatt*, a Defendant to this action, to secure a sum of £5500 recited to have been advanced, and a sum of £6000 recited to be due on certain bills of exchange. The mortgage provided that the mortgagors should not be at liberty to pay off the principal sum of £5500 before the 15th of December, 1884, unless the mortgagee should be willing to receive it. And "that during such time after the said 15th day of December, 1884, as the said principal sum of £5500, or any part thereof, shall remain unpaid, or during the said period of two years with the consent of *Lake & Co.*, it shall be lawful for the said *Francis Mowatt* to

exercise a free right of option of taking in repayment of the whole of the said principal sum of £5500 or any part thereof, which shall at the date of exercise of such option be unpaid, five-eighths of the share held by *Lake & Co.* (whether under or by virtue of the syndicate paper or of some further arrangement and assignment) at the date of these presents or at that of the exercise of such right of option, whichever shall be greatest in the undertaking and property of the syndicate." "And that upon his signifying to them in writing his intention to exercise such rights of option as hereinbefore contained, they, *Lake & Co.*, will forthwith at their own cost" convey such share and rights to *F. Mowatt.*

Messrs. *Lake & Taylor* were adjudicated bankrupt in February, 1883, and Messrs. *Spain & Cape* were appointed official trustees of their estate. On the 3rd of April, 1884, Messrs. *Spain & Cape* contracted with the Plaintiffs, the *Milford Haven Railway and Estate Company*, to sell their interest as trustees in bankruptcy in the mortgaged premises for £15,000. One term of the agreement was "the sum of £6500, part of the said purchase-money, shall be paid by the purchasers into Court under the *Conveyancing Act*, 1881, within fourteen days from the date hereof, and the said sum of £6500 or so much thereof as may be necessary shall be applied in or towards payment of Mr. *Francis Mowatt* of the amount (if any) which he may establish his right to have paid to him as mortgagee, and so much of the said sum of £6500 as shall not be actually paid to the said *Francis Mowatt* as such mortgagee shall be paid to the vendors as such trustees as aforesaid, and the purchasers shall in no event have any interest in or lien upon the said sum of £6500 or any part thereof."

On the 17th of April *Spain & Cape* assigned all their interest as trustees in bankruptcy in the subject matter of the mortgage to the Plaintiff company, and received £8500 part of the purchase-money from the Plaintiff company. The balance of the purchase-money, £6500, instead of being paid into Court under the *Conveyancing Act*, 1881, was deposited with the *National Provincial Bank of England* in the joint names of the Defendant *Spain* and two directors of the Plaintiff company. The Defendants *Spain & Cape* disputed the validity of the mortgage to the Defendant

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Mowatt on the ground that it had been executed, as they alleged, at a time when the Defendant *Mowatt* had notice of a previous act of bankruptcy suffered by Messrs. *Lake & Taylor*. And on the other hand the Defendant *Mowatt* asserted that the mortgage was a good security for upwards of £8000. In an affidavit in the matter he had since offered to take the sum of £5500 and interest as the amount due on his mortgage.

On the 29th of August, 1884, the Plaintiffs, the *Milford Haven Railway and Estate Company*, took out an originating summons, which was served on the Defendants *Spain & Cape*, and also on the Defendant *Mowatt*, that the Defendants *Spain & Cape* might be directed to pay into Court under sect. 5 of the *Conveyancing and Law of Property Act*, 1881, the sum of £6500 in order to provide for the payment to Mr. *Francis Mowatt* of the amounts (if any) which he may establish his right to have paid to him as mortgagee claiming under the said alleged indenture of the 15th of December, 1882, and that an inquiry be directed to ascertain the amount of principal, interest, and costs (if any) due and payable to the said *Francis Mowatt* under the mortgage.

The Plaintiff company issued the writ in their action on the 24th of November, 1884, against *F. Mowatt* and Messrs. *Spain & Cape*, and claimed (1) an account of what (if anything) was due on the mortgage and to redeem the property comprised therein; (2) an injunction to restrain the Defendant *Mowatt* from exercising the option and the power of sale contained in the mortgage; and (3) a declaration that the sum of £6500 standing on deposit in the *National Provincial Bank of England* was applicable in the first place in payment to the Defendant *Mowatt* of what (if anything) was due to him on his mortgage and to have the same applied accordingly. The Plaintiffs gave notice of motion for an injunction to restrain the Defendant *Mowatt* from exercising the option and his power of sale, and also for an order on the Defendant *Spain* to concur in paying into Court the £6500 on deposit with the interest accumulated.

1884. Dec. 5. *Cozens-Hardy*, Q.C., and *Swinfen Eady*, for the motion:—

If the mortgage is good we are entitled to redeem in time to

save a part of the property from being taken at an undervalue under the option, and to have the money on deposit applied in such redemption, and we require an order of the Court both to protect us from our vendors and to compel the Defendant *Spain* to concur in paying the money due on the mortgage.

Higgins, Q.C., *Phipson Beale*, and *H. Reed*, for Messrs. *Spain & Cape*:—

We dispute the right of *Mowatt* to receive anything under the mortgage, we shall be able to shew that it is void. The money ought to be kept *in medio*, either where it is or in Court till we have established our case.

Cookson, Q.C., and *Latham*, for the Defendant *Mowatt*:—

Our client is entitled either to his money or his option, he is willing to receive the money before the last day, but should that day expire without payment from whatever cause he is entitled to take five-eighths of the property in exercise of his option. The Plaintiffs can have no greater right than the mortgagee through whom they claim.

PEARSON, J.:—

Matters stand simply thus. At the present moment *Mowatt* is entitled to be paid what is owing on the mortgage, the purchasers are entitled to have that paid to protect themselves against the option. The proper order to make I think is to direct that *Spain* shall concur with the two directors representing the company in paying to the Defendant *Mowatt* the sum due, which can be named, and that *Mowatt* is to convey his interest freed and discharged from the mortgage on or before Tuesday next (December 9th), and if the trustees in bankruptcy desire to prevent *Mowatt* being paid that sum they must take proceedings of their own, and then an order will be made to protect everybody. At present there is nothing to prevent the payment.

On the 6th of December, 1884, the Defendants *Spain & Cape* issued a writ in an action against the Defendant *Mowatt*, indorsed with a claim to set aside the mortgage of January, 1883, on the

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ground of fraudulent preference. They gave notice of motion for Tuesday the 9th of December to restrain the Defendant *Mowatt* from receiving any part of the £6500 and interest. On that day the motion stood over till the next motion day with an interim order restraining the Defendant *Mowatt* from receiving the money ordered to be paid to him by the company, he undertaking not to exercise his option in the meanwhile; the motion in the company's action to be brought on, together with that in the action of *Spain* v. *Mowatt*.

Dec. 19. The interim injunction and undertaking having been continued till this day, the motion in *Spain's* action was heard and that in the company's action was again discussed, together with the summons of August, 1884.

Higgins, Q.C., *Phipson Beale*, and *H. Reed*, for *Spain & Cape*:—

The evidence now before the Court is sufficient, subject to its being displaced at the trial, to shew that the mortgage is void. Therefore the Court will take care that the money is not paid to *Mowatt*

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Plaintiff company:—

In case the Court considers the mortgagee is not to be paid at once, the *Milford Haven Company* are entitled to be protected; they are purchasers who have paid the whole purchase-money and ought not to suffer from the disputes of others, and ought to have the property freed from the mortgage and without danger of the option being put in force. Sect. 5 of the *Conveyancing Act*, 1881, might be conveniently put in force. The £6500 might be paid into Court to protect the rights, if any, of the mortgagee, and the interest of the mortgagee in the property be vested in the Plaintiff company by an order of the Court.

Cookson, Q.C., and *Latham*, for *Mowatt*:—

The provision in the 5th section of the Act is not intended to apply to a case where there is a dispute between the mortgagees and mortgagors as to the validity of the mortgage: it is intended

to enable a good title to be made where there is an admitted charge, but for some reason the mortgage cannot be paid off at once, if, for instance, there is a dispute between persons claiming under the mortgagee, or if the persons entitled to the mortgage cannot be found. *Mowatt* is entitled either to be paid or to exercise his option.

Cozens-Hardy, in reply.

PEARSON, J. (after deciding on the motion in the action of *Spain* v. *Mowatt* that on the evidence then before him there was a question of sufficient substance which ought to be tried before the money was paid to *Mowatt*, and restraining him from receiving the money, continued:—)

Under those circumstances I think the *Milford Haven Company* are entitled to be absolutely protected, and I do not hesitate to say that in my opinion if the *Conveyancing and Law of Property Act*, 1881, had never been passed this Court would have protected the *Milford Haven Company* in such a case from being injured in any way whatever by an attempt on the part of Mr. *Mowatt* to exercise his option as against them in consequence of litigation between him and the trustees in bankruptcy of Messrs. *Lake & Taylor*. But the *Conveyancing and Law of Property Act*, 1881, contains certain provisions which, I think, may be usefully applied on the present occasion. The Act (sect. 5, sub-sect. 1) provides that where any land has been sold out of Court, in the case of capital moneys charged upon it the Court may, upon the payment into Court of the amount sufficient to meet the incumbrance and any interest due thereon, and of such additional amount as the Court considers to be sufficient to meet the contingency of further costs, expenses, and interest, not exceeding one tenth part of the original amount, order the money to be paid into Court, and then (sub-sect. 2), if it thinks fit, "declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court." I propose therefore to proceed under this Act, and in your action also Mr. *Hardy*, and I propose to direct the persons in whose names that

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£6500 is deposited to pay this £6500 into Court, and if it appear that more money will be necessary in order to make up the 10 per cent. which I think ought to be paid in, I suppose, Mr. *Hardy*, you will undertake to pay that in.

Cozens-Hardy, Q.C. :—Yes. Will your Lordship to save expense make a vesting order, and also restrain the Defendant *Mowatt* from exercising his option during the few days that must elapse till the money is paid in.

PEARSON, J. :—Yes, vest the property in your clients for all the estate and interest of Mr. *Mowatt* and the trustees in bankruptcy, and direct the money to be carried to a new account of the mortgage of the 15th of December, 1882, between Messrs. *Lake & Taylor* and Mr. *Mowatt* in dispute in the action of *Spain* v. *Mowatt*. That I think will be ear-marking it sufficiently. I direct the dividends to be received and accumulated until further order with liberty to any parties interested to apply. I will restrain Mr. *Mowatt* from acting on his option in the meanwhile.

Solicitors for the Plaintiff Company: *Ashurst, Morris, Crisp, & Co.*

Solicitors for the Defendant *Mowatt: Robins, Cameron, & Kemm.*

Solicitors for the Defendants *Spain & Cape: Miller & Miller.*

D. P.

FERNS *v.* CARR.

PEARSON, J.

1885

Jan. 21.

[1884 F. 120.]

Solicitor—Articled Clerk—Return of Premium.

A solicitor who had received a premium on taking an articled clerk died during the term of the articles:—

Held, that his estate was not liable for the return of any part of the premium.

ARTICLES of agreement, dated the 16th of November, 1880, were entered into between *Henry Joseph Carr*, a solicitor, of the one part, and *Francis Ferns*, the Plaintiff, and his son, *Harry Clifford Ferns*, of the other part, by which *Harry Clifford Ferns* was bound as an articled clerk for the term of five years to *Henry Joseph Carr*, who, in consideration thereof, and of £150 paid him by the Plaintiff, covenanted to receive *H. C. Ferns* as his clerk, and "that the said *H. J. Carr* will, by the best ways and mean he may or can, and to the utmost of his skill and knowledge teach and instruct, or cause to be taught or instructed, the said *H. C. Ferns* in the said practice or profession of a solicitor which the said *H. J. Carr* now doth or shall at any time hereafter during the said term use or practise," and at the end of the term to use his best means and endeavours to procure *H. C. Ferns* to be admitted a solicitor.

Mr. *H. J. Carr* died in December, 1883. He had no partner, and no arrangements were made that Mr. *H. C. Ferns* should complete his articles with another solicitor. This action was brought by Mr. *Francis Ferns* against the executors of Mr. *H. J. Carr*. The Plaintiff claimed the return of a proportionate part of the premium of £150 and in the alternative damages for the non-performance of the agreement so far as it remained unperformed. The action was heard on summons for judgment on admissions.

Decimus Sturges, for the Plaintiff:—

This case is exactly the same as *Hirst* v. *Tolson* (1), which has

(1) 2 Mac. & G. 134.

PEARSON, J. 1885 FERNS v. CARR.

been recognised in *Atwood* v. *Maude* (1). It is true that in *Whincup* v. *Hughes* (2) it was held that no part of an apprenticeship premium was returnable, but in that case the master was not a solicitor, and I submit that the reason given in the older cases —*Ex parte Prankerd* (3), *Ex parte Bayley* (4)—for exercising the jurisdiction in the case of articled clerks, that the Court has a peculiar jurisdiction over its own officers, sometimes styled a paternal and masterful jurisdiction, is sufficient to uphold *Hirst* v. *Tolson* (5). Other old authorities are *Newton* v. *Rowse* (6) and *Unwin* v. *Fawnt* (7). The contract by the deceased in this case was binding on the executors to cause the clerk to be instructed during so much of the term as was unexpired at the death of Mr. *Carr*.

Ingle Joyce, for the Defendants:—

Hirst v. *Tolson* was in effect overruled by *Whincup* v. *Hughes*. The Judges in the latter case were unanimous in thinking the opinion of Lord *Cottenham* in the former could not be supported. The ground of the decision was not that there was any difference between a solicitor and any other person, so far as his contract with an apprentice is concerned. On principle, the Court has no peculiar jurisdiction over a solicitor or a solicitor's representatives in respect of matters outside his duties as solicitor.

The articles contained nothing unusual, nor anything to impose an obligation to find a successor to Mr. *Carr* as master.

The clerk in this case has had the full benefit of the premium paid, having been instructed for three years; the time has arrived when the loss from the determination of the relationship is on the master's side.

Decimus Sturges, in reply.

PEARSON, J.:—

There have been a good many cases in the books on matters of this kind. It would seem that in the older cases even Courts of

(1) Law Rep. 3 Ch. 369, 375.
(2) Ibid. 6 C. P. 78.
(3) 3 B. & A. 257.
(4) 9 B. & C. 691.
(5) 2 Mac. & G. 134.
(6) 1 Vern. 460.
(7) Finch, 144.

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Law have interfered between solicitors and their clerks to determine whether any part of the premium ought to be returned. One of the earliest cases cited to me was that of *Ex parte Prankerd* (1). In that case an apprentice had run away from service, and the solicitor refused to take him back. Chief Justice *Abbott* said: "It is extremely convenient that, in cases like the present, the Court should exercise a summary jurisdiction for adjusting disputes between the officers of this Court and their clerks. It appears to have been exercised by us and by our predecessors; and I think we ought not to disturb so useful a practice. This is very different from the case cited from the Exchequer. Our jurisdiction here depends on the authority of the Court over its own officers." Now, in that case, the contract had not come to an end by the death of either party. The next case was the case of *Ex parte Bayley* (2). There an attorney had died, and Lord *Tenterden* says: "I am of opinion that this case is not to be decided by any strict rule of law. The Court exercises a jurisdiction over attorneys, and that is to be exercised according to law and conscience, and not by any technical rules; and considering the circumstances of this case, and the effect of the Act of Parliament which prohibits attorneys from having more than a certain number of clerks, we think that the report should be confirmed. This clerk was bound to one only in name, but in reality and in conscience he was bound to the two: he was to be instructed by the two who were in partnership together; and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the Act of Parliament, and enable the partners to have that number of clerks which they could not otherwise have had if *Bayley* had been bound to the two instead of one of them. In conscience, it appears to me to be a binding to the two; the premium was paid to the two; and the one being dead, and the other having the full number of clerks which the law allows him, and not being able to retain this young man in his service, and instruct him and give him the benefit for which he paid the money, I think he who is the survivor is bound to refund whatever is to be refunded." Then he said the master had found a sum, and that ought to be paid. It is to be remarked on the judgment in that case that the opinion of the Court was that although the bond

(1) 3 B. & A. 257, 258.

(2) 9 B. & C. 691.

PEARSON, J. 1885 FERNS v. CARR.

was to one partner only the clerk was bound to the firm and there was a person surviving and able to fulfil the contract with him, except so far as he had put it out of his power to take another clerk. I do not think that case governs the present, because in the present it is admitted that there is no person who can fulfil the contract.

I think I may pass over the other cases and come to the case of *Hirst* v. *Tolson* (1), which is hardly, if at all, to be distinguished from the present case, and I suppose if it had not been commented upon in a later case cited to me it would have been my duty to follow it and decide that a portion of the premium was returnable. But when the case of *Hirst* v. *Tolson* was most carefully considered by the Judges in the Exchequer Chamber, in *Whincup* v. *Hughes* (2), they all dissented from it, considering, with all respect to Lord Chancellor *Cottenham*, that his judgment was wrong and saying there was no debt at law. Now if there is no debt at law, which I must take to be the fact on the authority of that case, it is exceedingly difficult to say there is any debt in equity, and if there is no debt in equity I am thrown back on that which is said to be the paternal and masterful jurisdiction over attorneys. I must say I do not understand what that is. I quite understand it put in another form, that every one who is a solicitor is an officer of the Court, and in respect of his conduct as such the Court has a summary jurisdiction which it exercises in a manner beneficial both to solicitors and others. But I cannot understand how there can be a paternal and masterful jurisdiction which can enable the Court to say that a contract between a solicitor and a third person is to be construed in another way than a like contract between other persons, and that notwithstanding the contract means one thing, the solicitor is to do another because the Court thinks it more honourable. I think if I were so to hold I should be assuming a jurisdiction to enforce a code of morals not written and not to be found definitely stated by any authority, and should be making the rule of the Court to vary, as Lord *Selden* (3) once said it did vary, according to the length of the foot of each Lord Chancellor.

I will go a step further and say if I were wrong in the conclusion

(1) 2 Mac. & G. 134. (2) Law Rep. 6 C. P. 78.
(3) *Selden*, Table Talk, title Equity.

I have come to, if I were to disregard the strict meaning of the contract, I should have great difficulty in saying that anything ought to be returned in this case. At least I should come to the conclusion that it ought to be a very small sum. The premium was £150; during three years the articled clerk has had the benefit of the solicitor's instruction, and, if he has benefited from it to the extent to which he ought, his services would be of considerable value to the solicitor for the next two years. And I very much doubt whether, upon any consideration, anything would be returnable except a very small sum. Under all the circumstances, though not without some doubt, because of the authorities cited, I think I must come to the conclusion that there is no power in the Court on a contract of this kind to say that any part of the premium ought to be returned.

Solicitors for Plaintiff: *Hamlin, Grammer, & Hamlin, for B. C. Pullan, Leeds.*

Solicitors for Defendant: *Few & Co.*

D. P.

WITHALL *v.* NIXON.

[1883 W. 2732.]

Practice—Mortgage—Foreclosure—Possession.

Where an order *nisi* for foreclosure and possession had been made the order absolute also provided for possession and was made *ex parte*.

THIS was a mortgagee's action in which the Plaintiff claimed foreclosure and (having regard to *Wood* v. *Wheater* (1)) possession of the mortgaged property. An order had been made that in default of payment of what should appear to be due, after taking the accounts, at the time stated the Defendants should be foreclosed, and that thereupon the Defendant, *Augustus Nixon*, the mortgagor, was to deliver up possession to the Plaintiff. On the 20th of December, 1884, the Judge, on an *ex parte* application by the Plaintiff, made the order for foreclosure absolute. In drawing

(1) 22 Ch. D. 281.

PEARSON,J. 1885 WITHALL v. NIXON.

up the order the registrar wished to have the direction of the Judge as to whether the final order should repeat the provision for delivering possession to the Plaintiff, and if so whether it was properly obtained *ex parte*.

Ribton, for the Plaintiff.

PEARSON, J.:—

I think that the final order for foreclosure should follow the conditional order for foreclosure, and should repeat the words as to delivery of possession to the Plaintiff. I do not see any objection to the final order in this form being made upon an *ex parte* application in the usual way.

Solicitor for Plaintiff: *H. Dain.*

D. P.

PEARSON,J. 1885 *Jan.* 23.

DRAGE *v.* HARTOPP.

[1884 D. 2559.]

Practice—Parties—Rules of Supreme Court, 1883, *Order* XVI. *r.* 11.

One of two executors having absconded, the other executor sued a mortgagor. The Court refused on the application of the Defendant to add the absconding executor as Defendant.

THIS was an action brought by one of two executors against an alleged mortgagor of certain freeholds, a leasehold house, and a policy of insurance. The statement of claim alleged "The Plaintiff and *Frederick Searle Parker*, were executors of *George Ashwell*, deceased.

"On the 31st of December, 1878, *Frederick Searle Parker* as such executor lent to the Defendant the sum of £6968 at interest at £4 10*s.* per cent.

"On the 5th of June, 1879, *Frederick Searle Parker* as such executor as aforesaid lent to the Defendant the further sum of £9000, at interest at 4 per cent.

"The said sum of £6968, with £290 8*s.* 4*d.* for interest, and the sum of £9000, with £360 for interest, is due to the estate of the said *George Ashwell*.

"The said two sums were lent through the firm of Messrs. *Parker*, who were acting in relation to the said loans as solicitors to the estate of the said *George Ashwell*, with notice to and knowledge by the Defendant that they were the moneys belonging to *George Ashwell's* estate, and in respect of the said sums the Defendant signed certain charges in writing to the said Messrs. *Parker*, acting on behalf of *Frederick Searle Parker*, as executor of *George Ashwell*, charging the said sums and interest on" the properties specified in the statement of claim. The Plaintiff claimed "personal payment by the Defendant, and in default of payment an account and sale, or foreclosure and possession and a receiver." The Plaintiff's co-executor, *Frederick Searle Parker*, was bankrupt, had absconded, and was out of the jurisdiction.

This action was brought by leave of the Court in an action for the administration of the estate of *George Ashwell*.

This was a summons on behalf of the Defendant that *Frederick Searle Parker* might be added as a Defendant.

Whitworth, for the Defendant:—

Unless the other executor is a party to this action, the Defendant will be in danger of having a second proceeding taken against him. As *Parker* cannot be made a co-Plaintiff, the proper course will be to add him as a Defendant, under Order XVI., rule 11: *Luke* v. *South Kensington Hotel Company* (1).

Langley, for the Plaintiff:—

If the objection as to parties is one of substance, it is a defence to the action. If it is an objection of form, it is an attempt to revive the abolished plea in abatement. But even under the old practice, a plea of non-joinder of co-contractors had to be supported by an affidavit that the party not joined was within the jurisdiction.

The present Plaintiff is a proper Plaintiff, though the transaction was between the Defendant and the other executor: *Webster* v. *Spencer* (2); and under Order XVI., rule 6, he can sue alone. The Defendant is protected against being sued a second time by the pending "administration action."

(1) 11 Ch. D. 121. (2) 3 B. & A. 360.

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Whitworth, in reply.

PEARSON, J.:—

If the allegations in the first four paragraphs of the statement of claim are made out, it seems to me to be immaterial for any purpose that *Frederick Searle Parker* should be before the Court. A question may arise whether he is interested in the subject matter, and if any question of that sort does arise, the Court will be able to deal with it, and protect the Defendant. At the present moment I think it is unnecessary that this action should be complicated or delayed by any addition of the name of *Frederick Searle Parker* to the record. I have no power to add him as Plaintiff. If he is added as Defendant he would be out of the jurisdiction, and I have no evidence of where he is, and there is no evidence that it would be possible for the Court to make an order for substituted service. I refuse to make the order.

Solicitors for Defendant: *Prior, Bigg, Church, & Adams.*
Solicitors for Plaintiff: *Fairfoot, Webb, & Rooke.*

D. P.

PEARSON, J. 1885 *Jan.* 15, 16, 24.

BURNABY *v.* EQUITABLE REVERSIONARY INTEREST SOCIETY.

[1883 B. 5889.]

Infant—Joint Tenancy—Severance.

A marriage settlement contained a proviso for the settlement of the present and after-acquired property of the intended wife, who was an infant. She was then entitled in remainder jointly with two others to a share in Bank annuities standing in the names of trustees:—

Held, that the joint tenancy was severed.

IN the year 1871 the Plaintiff married his late wife, Miss *Winifred Constance Crake*, who was under age. She was then entitled under the will of *Winifred Wightman*, jointly with her two brothers, to one-third of a sum of Bank annuities in reversion expectant on the death of the survivor of three joint tenants for life, and was also entitled jointly with her two brothers to a

further sixth part of the annuities in the event of a contingency which afterwards occurred. Previously to the marriage a settlement was executed by both the Plaintiff and Miss *Crake*, by which, after reciting that Miss *Crake* was entitled to a ninth reversionary share and contingently entitled to a further eighteenth reversionary share in the Bank annuities under the will of *Winifred Wightman*, the Plaintiff assigned all the interest that would accrue to him by the intended marriage of and in (among other property) the ninth reversionary share and the eighteenth contingent reversionary share of Miss *Crake* in the Bank annuities under the will of *Winifred Wightman* to the trustees of the settlement, upon trusts in favour of the intended husband and wife during their lives, and after the death of the survivor in favour of the issue of the marriage, and in default of children who being sons attained twenty-one, or being daughters who attained that age or married, as *Winifred Constance Crake* should, notwithstanding coverture, by will appoint. The settlement contained a proviso that if *Winifred Constance Crake* then was, or she or her husband in her right should become entitled to property during coverture beyond a certain value, it should be settled on the above trusts.

Winifred Constance Burnaby attained twenty-one and died in May, 1873, without having attempted to repudiate or avoid the covenant, and having made a will whereby in exercise and execution of every power for that purpose given to her by her marriage settlement and of all other powers, she appointed and gave all the residue of her property over which she had any power of appointment or disposition to the Plaintiff absolutely, and appointed him her sole executor. The Plaintiff duly proved the will.

There was no issue of the marriage. One of the joint tenants for life of the Bank annuities under the will of *Winifred Wightman* and the two brothers of the Plaintiff's late wife survived her.

This was an action for specific performance of a contract by the Defendant society to purchase one-sixth reversionary share in the Bank annuities. Certain objections to the title were taken, one of which was that the settlement had not severed the joint interest of the late Mrs. *Burnaby* and her brothers, and that consequently her interest had survived to her brothers.

PEARSON, J.

1885

BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY.

Cozens-Hardy, Q.C., and *Wolstenholme*, for the Plaintiff:—

The provision for the settlement of present and after-acquired property operated as an assignment, not only by the intended husband but also by the intended wife.

The deed of an infant is good so long as it is not avoided, certainly unless it operates against the infant's interest. The settlement therefore in this case severed the joint tenancy: *Caldwell* v. *Fellowes* (1); *Baillie* v. *Treharne* (2); *Smith* v. *Lucas* (3); *Preston* on Abstracts (4); *Coke* on *Littleton* (5); *Allen* v. *Allen* (6), approving of *Zouch* v. *Parsons* (7) notwithstanding Mr. *Preston's* remarks (8).

The late Mrs. *Burnaby* not only never avoided the assignment, but so far as she could ratified it by executing her will; though a married woman cannot assign her reversionary interest she may do certain acts such as make an election, and the better view may be that she can ratify a voidable instrument just as she can elect: *Wilder* v. *Pigott* (9); *Smith* v. *Lucas*.

Cookson, Q.C., and *F. A. Lewin*, for the purchasers:—

The deed of an infant being voidable does not sever a joint tenancy. Lord Chancellor *Bathurst* in the case of *May* v. *Hook*, is reported by *Butler* in a note to *Coke* on *Littleton* (10) to have said: "It would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint tenancy, as, if that were allowed, it would always be in the power of the infant to say whether the joint tenancy should be severed or not; then, if any of the co-joint tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint tenants."

Mrs. *Burnaby* was under coverture till she died, and therefore could not deal with her reversionary property, either by way of ratification of a voidable deed or otherwise: *Wall* v. *Wall* (11):

(1) Law Rep. 9 Eq. 410.
(2) 17 Ch. D. 388.
(3) 18 Ch. D. 531.
(4) Vol. i. p. 319.
(5) Pages 380 (b), 337 (a).
(6) 2 D. & War. 307, 338.
(7) 3 Burr. 1794.
(8) *Preston* on Conveyancing, 3rd ed. vol. ii. p. 250.
(9) 22 Ch. D. 263.
(10) Page 246 (a).
(11) 15 Sim. 513.

Williams v. *Mayne* (1). She could not be put to her election to enable her to do what she could not otherwise do: *Smith* v. *Lucas* (2).

Cozens-Hardy, in reply:—

The decision in *May* v. *Hook* does not require the reasoning assigned by *Butler* to Lord *Bathurst*. The report of the case, made so long after, without any account of where the materials for it had been got, is of little value. What the effect on the position of co-tenants would be was not a circumstance to be considered in relation to an act of an infant.

Jan. 24. PEARSON, J.:—

The question is, was the settlement sufficient to sever the joint tenancy? Now upon that I confess I entertain no doubt. Nor do I think that according to the well-established rule of law any doubt can reasonably be entertained. The words are sufficient, at all events if the infancy does not come into question. It is settled beyond doubt by a decision of Vice-Chancellor *James* in *Caldwell* v. *Fellowes* (3), which was referred to by both sides. Nor do I think it was seriously contended before me that if Miss *Craig* had been of age at the time when the settlement was executed, having this clause in it, it would not have effected a severance.

The argument before me was that although that might be very well if she had been of age, the fact of her being an infant deprived it of that effect. It was argued in this way. In the first place it was said that an infant cannot by a voidable deed sever a joint tenancy. The question arises therefore at once what can an infant do, and what is the effect of a deed executed by an infant?

Now in the case of *Zouch* v. *Parsons* (4), which, notwithstanding Mr. *Preston's* objection to it, we must at the present day consider to have been well decided, Lord *Mansfield* says (5): "We think the law is, as laid down by *Perkins*, that 'all such gifts, grants, or

(1) Ir. R. 1 Eq. 519.
(2) 18 Ch. D. 531.
(3) Law Rep. 9 Eq. 410.
(4) 3 Burr. 1794.
(5) 3 Burr. 1804.

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deeds made by infants which do not take effect by delivery of his hand are void; but all gifts, grants, or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate.'" That is entirely in agreement with what is laid down in the 634th section of *Littleton*, referred to in *Coke* upon *Littleton* (1): "And it hath been said that if two joint tenants being within age make a feoffment in fee, and one of the infants die, and the other surviveth; inasmuch as both the infants might enter jointly in their lives, this right accrueth well to him which surviveth, and therefore he that surviveth may enter into the whole." Lord *Coke's* comment upon that is: "And the reason hereof is implied in this; for that they may join in a writ of right, and therefore the right shall survive. But they cannot join in a *dum fuit infra ætatem*, because the nonage of the one is not the nonage of the other. In this case, if one joint tenant had made a feoffment in fee and died, the right should not have survived, for the jointure was severed for a time." Therefore Lord *Coke* certainly came to the conclusion that an infant could during his infancy sever a joint tenancy by deed.

But it is said there is authority against this, namely, the authority of *May* v. *Hook*, decided by Lord *Bathurst*, and reported in a note by Mr. *Butler* (2). He says: "This and many other passages in this work respecting the operation and force of the acts of infants, were fully considered in the cases of *Zouch* v. *Parsons* (3) and *May* v. *Hook*, heard before Lord Chancellor *Bathurst* in 1773. There being no printed account of the last case, it may not, perhaps, be unacceptable to the reader to find an account of it here." The facts of this case appear to have been that *Ann May* and her two sisters were infants, and that upon her marriage with *John Hook* there were articles of agreement entered into, of which it is not necessary to say more than this, that upon the face of them they were so extravagantly for the benefit of the husband and not for the benefit of the infant, that they may be described as having been fraudulent as regards the infant: and the Lord Chancellor undoubtedly considered that

(1) Page 337 (a). (2) 2 Co. Litt. 246 (b).
(3) 3 Burr. 1794.

that was the proper construction to be put upon them; because in deciding that there was no severance of the joint tenancy, he says that it had been "attempted to be established by counsel that had *Ann May* been of full age when she entered into the articles, they would have amounted to a severance; but that no determination to that effect had ever been made; that the co-joint tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir-at-law, who claims only under his ancestor; that the utmost which the infant could do would be an avoidable act; and that, of course, it would be in the discretion of the Court either to give or refuse their assistance to it; and, by a parity of reason, it must always be in their power to model his contracts at their pleasure." I only stop there for one moment to say that I do not understand what the Lord Chancellor meant by those words—"That the contract, in the present case, was not such as the Court would uphold. Had the infant lived to come of age, and a bill been filed against her for a performance of the articles, the Court would have them set aside, and referred it to a Master to draw new proposals for a proper settlement; that as the contract was not such as would have bound the infant herself, *à fortiori* it should not bind the co-joint tenants."

Now so far as I have read there is sufficient ground for the Chancellor's decree. The Chancellor's decree rested upon this, that although as the law was and is, an infant may execute a deed for his own benefit which nevertheless would be voidable by him if he comes of age and chooses to avoid it—if after his death the instrument produced by which it was sought to bind the infant's estate is upon the face of it one which is not for the benefit of the infant (as for instance in the example given in the older books, if you produce a lease upon which no rent was reserved), the Court will hold that it is not an instrument which the infant could have been called upon properly to execute, or which the Court could hold binding upon the infant's estate when the infant had done no act after he came of age to shew that he intended it. But the words relied upon in this judgment in support of the doctrine that a joint tenancy cannot be severed

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by an instrument which is voidable because it is executed by an infant, are those which I am about to read: "That it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint tenancy, as, if that were allowed, it would always be in the power of the infant to say whether the joint tenancy should be severed or not; then, if any of the co-joint tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem* and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint tenants." I do not believe the Lord Chancellor ever gave that as a reason for his judgment. It is perfectly plain that it is no reason at all. If the infant had the power of avoiding the deed, how could any interest or any disadvantage to the joint tenant take away from the infant any power that he had? What I think has very likely happened is, that in the course of the argument some observation to this effect fell from the Chancellor, namely, that this disadvantage would follow undoubtedly to the joint tenants, that during a certain period they might hold, and consider that the infant had severed the joint tenancy, and then find at a later period that he had a right to undo that which he seemed to have done; but that he gave it as a reason, my respect for the Lord Chancellor will not allow me to suppose for one moment, and not knowing where the report comes from, or where Mr. *Butler* got it from, I think it is only doing justice to the Lord Chancellor to suppose that this was an observation that fell from him, and was not a reason that he gave for his judgment. At all events it certainly is not a reason which can bind this Court, seeing that it is not in the least necessary for the decision of this case, which stood upon other and much higher grounds.

To a certain extent this very proposition came before the late Master of the Rolls in the case of *Smith* v. *Lucas* (1), which is a case to which I must refer again for another part of the argument. That was also a case relating to a settlement executed by an infant. There was also a question of covenant as to her future acquired separate estate. Then Sir *George Jessel* says this (2): "Then, is the covenant void or voidable? I think it is

(1) 18 Ch. D. 531. (2) 18 Ch. D. 543.

voidable. I cannot help seeing that there may be cases in which such a covenant as this would be for the benefit of the wife so as to protect her from her husband. It settles the property on her for life restrained from anticipation, with a remainder for the children. It is part of the whole arrangement made on the marriage, by which provision is made for her and her children. It is a voidable covenant, in my opinion, and not a void covenant. The next question is, What is the effect of such a covenant in Equity? It has been said that the effect in Equity of the covenant of the wife, as far as she is concerned, is, that it does not affect her personally, but that it binds the property: that is to say it binds the property under the doctrine of Equity that that is to be considered as done which ought to be done. That is in the nature of specific performance of the contract no doubt. If, therefore, this is a covenant to settle the future acquired property of the wife, and nothing more is done by her, the covenant will bind the property. There is no reason, as far as I am aware, for distinguishing a voidable covenant from any other covenant: till it is avoided it is a binding covenant."

Now that seems to me to meet this case entirely. If this had been a covenant by a person of full age, there would have been no question at all. It being simply a covenant by an infant it is, I apprehend, good as far as binding her property goes, unless it is avoided; and, if she did no act whatever to avoid it, it being evidently taken as part of the settlement, and taking the settlement altogether as something which was for her benefit, it is a perfectly good covenant, to which the Court ought to give effect, and it binds the property unless there was something done to avoid the deed altogether. In the present case nothing whatever was done by the lady after she came of age to shew that she elected in any way to avoid what she had done as an infant. On the contrary, the only act we have of hers is that she made a will purporting to take effect, and which could only take effect, under the power given to her under the settlement, and so far as it can have any weight or significance at all, that shews that she intended not to avoid, but to confirm the deed.

The next point, I think, raised by Mr. *Cookson* in his argument was that there was no confirmation of this, and that in fact the

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lady, inasmuch as she was under coverture, was incapable of confirming it, because she was incapable of disposing of the reversionary interest while she was under coverture. To begin with, what I have said before meets and answers that argument, because no act of the lady was necessary in order to confirm this deed. But I differ from Mr. *Cookson's* argument in another respect. He cited a passage in Sir *George Jessel's* judgment in *Smith* v. *Lucas* (1), in order to shew that the lady could not confirm this, because she had no power of disposing of the reversionary interest during her coverture. To my mind the disabilities of infancy and the disabilities of coverture are very different. The disability of coverture is an absolute disability, in a case of this kind, to dispose of her reversionary interest. The disability of infancy goes no further than is necessary for the protection of the infant, it leaves the infant the power to make the deed in the first instance; but, for the protection of the infant, it gives the infant also the right to avoid that deed if the infant finds it right and proper so to do when the infant comes of age. Therefore, to begin with, the disabilities are not *in pari materiâ*. But, in addition to that, I do not think that the Master of the Rolls meant to say that which Mr. *Cookson* thought he did say in his judgment. In that case the lady had executed a deed after she came of age and while she was under the disability of coverture, which deed purported to bind her as regarded her future acquired property. What the Master of the Rolls decided there was this—not that she could not confirm a deed which she had executed whilst she was an infant if it needed confirmation (which it did not), but that she could not, after she had been married and was under coverture, execute a deed by which she should bind herself for the future never to disturb the deed which had been executed while she was an infant, with regard to property which was then reversionary, and of which as a married woman she could not dispose. That is a very different proposition. That is merely saying this: What it is attempted to bind you by is an act which amounts (if it amounts to anything) to a disposal of your future property which, as a married woman, is something which you cannot do, and if you cannot dispose of it you cannot contract to

(1) 18 Ch. D. 531.

dispose of it. He says this (1): "I think that the power of disposal given to a married woman as regards her separate property is simply a power to dispose of existing property, and not a power by contract, or *quasi* contract—for she cannot strictly contract—to dispose of other property while she is a married woman. In other words, I shall hold that the contract by a married woman, while married, to convey all her future-acquired separate estate will not bind that separate estate when acquired—that her power of disposition does not extend to that. It seems to follow that no confirmation by her of a settlement executed by her when an infant, and containing such a contract, will effectually bind her as regards the property not then acquired; that is, not in existence at the time of the confirmation. That disposes of the deed" —but he admits that she can elect, a point which I really have not got to consider here, because, as I say, the deed remained unavoided, and the deed remaining unavoided at the time of the death of this lady, it bound her property, though it did not bind her personally.

That being so, I have come to the conclusion upon this case that there was a proper severance of the joint tenancy, and a valid and effectual one, and that consequently the reversionary interest was capable of passing, and did pass, under the will executed by the lady.

Solicitors for Plaintiff: *Cookson, Wainewright, & Pennington.*
Solicitors for Defendants: *Clayton, Son, & Fargus.*

(1) 18 Ch. D. 545.

D. P.

PEARSON, J.

1885

Jan. 27.

STRICKLAND *v.* WELDON.

[1883 S. 3727.]

Charity — Account — Parties — Representative Plaintiff — Attorney-General — Fund raised by Voluntary Subscriptions — Action by some Members of Committee on behalf of all against former Member — Certificate of Charity Commissioners — Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62 [*Revised Ed. Statutes, vol. xi., pp.* 986, 999].

An action was brought by five of the members of a church building committee, on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the Church Building Fund during the period of his membership. The fund was raised by voluntary subscriptions; seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the church of the parish, and to apply the moneys thus collected:—

Held, that, the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against others.

But *held*, also, that, even if all the subscribers were suing, the action could not be maintained in the absence of the Attorney-General.

Whether the action could be maintained without the certificate of the Charity Commissioners, *quære*.

THE writ in this action was issued by the Rev. *J. C. Strickland, Frederick Barnes, Francis Butler, William Clay*, and *David Vigo*, on behalf of themselves and all other the members of the *St. Saviour's Church Building Committee*, against the Rev. *G. W. Weldon*, a former member of the committee. The indorsement on the writ was, "The Plaintiffs sue, on behalf of themselves and all other the subscribers to the *St. Saviour's Church Building Fund*, for an account of all moneys received and paid by the Defendant respectively in respect of the *St. Saviour's Church Building Fund*, between the 1st of January, 1875, and the 31st of December, 1881, and for payment to the Plaintiffs of the balance which shall be found due from the Defendant on taking such account."

The fund in question was raised by voluntary subscriptions for the alteration and improvement of *St. Saviour's Church, Chelsea.*

Seventeen persons, including the vicar of the parish, and the

churchwardens, constituted themselves a committee for the purpose of receiving subscriptions for the objects in question. The Defendant was the vicar of the parish, and as such a member of the committee, during the whole of the period from the 1st of January, 1875, to the 31st of December, 1881. At the latter date the first Plaintiff became vicar of the parish, and, in that character, a member of the committee, in the place of the Defendant. The other four Plaintiffs, two of whom were the churchwardens, were also members of the committee.

The Plaintiffs took out a summons under Order xv. of the Rules of the Supreme Court, 1883, for an account in the terms of the indorsement on the writ. The summons purported to be taken out on behalf of the Plaintiffs suing on behalf of themselves and all other the members of the committee.

Everitt, Q.C., and *L. Ryland*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *H. Burton Buckley*, for the Defendant:—

There are some preliminary objections to the action: (1.) The Plaintiffs are not entitled on behalf of themselves and other members of the committee to sue another member. They do not allege that they have any beneficial interest in the fund, or that the Defendant is the treasurer. The principle of a representative action does not apply to such a case.

(2.) The fund is a charitable fund, and the Attorney-General alone is entitled to sue on behalf of a charity. Even if all the members of the committee were Plaintiffs, the action could not be sustained.

(3.) The action cannot at any rate be brought without the certificate of the Charity Commissioners: *Charitable Trusts Act*, 1853, sect. 17. The case is not within the exceptions mentioned in sect. 62.

Everitt, Q.C., and *L. Ryland*, for the Plaintiffs:—

The fund is constituted by voluntary contributions, and is excepted by sect. 62 from the operation of the Act.

The Plaintiffs can maintain the action on behalf of the other

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members of the committee. The committee are appointed to receive the fund; they are trustees for the subscribers, and trustees can sue their co-trustee in respect of trust funds received by him.

[PEARSON, J.:—The committee is self-constituted.]

They are adopted by the subscribers, and one (or more) of them receives the money.

[PEARSON J.:—They are not trustees in the ordinary sense of the word. Suppose one member of the committee had received subscriptions, and a dispute arose among the members as to the application of the money; could the other members bring an action against him?]

It may be that in such a case the Attorney-General or the Charity Commissioners must interfere; but no such dispute has arisen. The Defendant admits that he received the money as agent of the committee; he is estopped from saying that he did not. He must be accountable to them.

[PEARSON, J.:—The difficulty is, that this is a voluntary body, unknown to the law. The Defendant has the same powers as any other member of the committee.]

If the money had been paid to a banker the Plaintiffs would have been entitled to sue him, and they are equally entitled to sue any other agent.

[PEARSON, J.:—Is not every member of the committee an agent for the subscribers?]

A partner can give a receipt to a stranger for partnership moneys, but he is accountable to his co-partners. The subscribers trust to the committee, and have delegated to them the right to receive and apply the subscriptions. If the committee were to misapply the money, no doubt the remedy of the subscribers would be through the Attorney-General. The right of a plaintiff to sue on behalf of other persons having the same interest is shewn by *De Hart* v. *Stevenson* (1). The Plaintiffs were in fact all subscribers to the fund, and, if necessary, the writ and the summons may be amended by stating that they sue on behalf of

(1) 1 Q. B. D. 313.

all the subscribers. In fact the indorsement on the writ states that the Plaintiffs sue on behalf of the subscribers.

[PEARSON, J.:—Could all the subscribers sue without the Attorney-General?]

They are suing in respect of a legal title. Those persons who have the legal title to a property applicable to charitable purposes have a right to recover it from a person who has possession of it without their sanction: *Holme* v. *Guy* (1).

PEARSON, J.:—

The summons as taken out is a summons by five gentlemen, who profess to sue on behalf of themselves and all other the members of the *St. Saviour's Church Building Committee.* Mr. *Everitt* has pointed out to me that, in what I may call the prayer of the writ, they are described as suing, not on behalf of the committee, but on behalf of all the subscribers to the fund, and, if the only objection to the action had been that the committee are named when the subscribers ought to have been named, I should have given leave to amend the summons immediately. That would have been a mere slip.

But, to my mind, if the subscribers are substituted for the committee it will not improve the Plaintiffs' position at all. However, as the case has been argued on behalf of the committee, I will deal with it on that footing. It appears that there was a desire to improve this church by enlarging or altering it in some way, and seventeen gentlemen constituted themselves a committee to obtain subscriptions, and to apply those subscriptions when received for those purposes. It was a self-constituted committee. The Defendant, who was then the incumbent of the parish, was one of them. This action has been brought against him by the present Plaintiffs, alleging that he has received on behalf of the fund certain sums of money for which he has not accounted, and which they are therefore entitled to recover from him. The case has been argued as if the Plaintiffs were ordinary trustees for a civil purpose, who, having associated with them another trustee who has some of the trust funds in his hands,

(1) 5 Ch. D. 901.

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are entitled to sue him in this Court in order to compel him to place those trust funds where they ought to be, in the names of all the trustees. But, in my opinion, the Plaintiffs are not trustees in the ordinary sense of the word; the members of the committee are nothing but agents—every one of them is an agent, for the subscribers; and, to my mind, the notion that two agents out of three can sue the third for money which the principal has directed to be paid to him is an entire novelty.

But, in addition to that objection, this fund is a charitable fund, and I conceive that, if all the subscribers were named in the writ as Plaintiffs, the action would be nevertheless defective because the Attorney-General is not here. The Attorney-General is the only person who can really represent a charity and sue on its behalf, and on that simple ground I must refuse to make any order upon the summons.

The further question has been raised whether the certificate of the Charity Commissioners ought not to have been obtained before commencing the action. If that had been the only objection I should have taken time to consider my judgment, because, no doubt, there is considerable difficulty in construing sects. 17 and 62 of the *Charitable Trusts Act*. At present I am not satisfied that the certificate of the Charity Commissioners is necessary; I am rather inclined to think that these being merely voluntary subscriptions are by sect. 62 outside the provisions of the Act. I do not, however, intend to decide that point now, because, as I have already said, I think that the action is hopelessly bad on other grounds, and, for aught I know, if the case should go before the Attorney-General, he may in the exercise of his discretion decline to issue his fiat, and the case may not come before the Court again, and, not only so, but even if the Attorney General is asked to give his consent to the action he may think that the certificate of the Charity Commissioners is necessary, and if that certificate is asked for it may be refused.

Under these circumstances I decline to waste the time of the Court in considering a question which may never arise at all.

Solicitors for Plaintiffs: *Clarke, Woodcock, & Ryland.*
Solicitors for Defendant: *Hores & Pattisson.*

W. L. C.

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Jan. 29.

[1884 C. 2301.]

Will—Construction—Ordinary Outgoings—Tenant for Life—Apportionment—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 73—[*Revised Ed. Statutes, vol. xii., p.* 675]—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 96, 97 [*Revised Ed. Statutes, vol. xiv., p.* 438].

A testator gave freehold and leasehold houses, bonds, and consols on trust to pay the income after deducting ordinary outgoings to his widow for life:—

Held, that the tenant for life must bear the cost of drainage work required to be done to one of the leasehold houses by the vestry under the Metropolis Local Management Act, 1855, s. 73.

JOHN CRAWLEY, the testator in this matter, devised and bequeathed certain freehold houses, certain leasehold houses, £1000 Khedive bonds, and £1000 £3 per cent. Consolidated Bank Annuities, to the trustees of his will "In trust after payment of all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise, to pay the rents and profits, and dividends, and other income thereof respectively," to his wife during her life.

One of the leasehold houses so bequeathed (No. 456, *Camden Road, St. Mary, Islington*) was held at a ground rent under a a lease for ninety years, dated October, 1853, which contained a covenant on the part of the lessee to bear and discharge the sewers-rate and all other taxes, rates, assessments, and impositions whatsoever already or thereafter to be charged on the premises, or on the landlord or tenant in respect thereof. The house was let to the occupier under an agreement by which it was provided that the occupier was to pay the sewers-rate, metropolitan main drainage rate, and all other rates, taxes, charges, and assessments whatsoever (except property tax).

A notice, dated March, 1884, was served on behalf of the vestry of *St. Mary, Islington*, on the owners of the house No. 456, *Camden Road*, under the *Nuisances Removal Acts* for *England*,

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and under the *Metropolis Local Management Acts*, "to abate the nuisance arising from the foul and defective condition of the drains, and for that purpose to construct a new glazed stoneware pipe drain in communication with the sewer in front, the premises situate and being No. 456, *Camden Road, Holloway*, in the parish of *St. Mary, Islington*." The work so required to be done was done by the testator's trustees at an expense of £62, which was deducted from the quarter's income of the tenant for life.

This was an originating summons, adjourned into Court, brought by the tenant for life, now Mrs. *Acton*, against the testator's trustees, to obtain, among other things, an order on the Defendants, the testator's trustees, out of the *corpus* of that part of the testator's estate of which the Plaintiff was tenant for life, to pay such expenses as had been properly incurred by them in laying down new drains at No. 456, *Camden Road*.

Warmington, Q.C., and *Vernon Smith*, for the Plaintiff:—

There is no authority absolutely in point; the nearest case is *Ex parte Davis* (1), which decided, before the Amendment Act of 1862, that expenses of this sort were to be charged on the property.

These expenses are for the permanent benefit of the property, and it is not fair that they should be thrown entirely on the tenant for life. The question depends on what is the meaning of the words "ordinary outgoings," in the testator's will. The cost of putting down a new drain is an extraordinary outgoing in the nature of a permanent improvement.

Everitt, Q.C., and *Chester*, for the trustees:—

Ex parte Davis is no authority in this case, because the property there was freehold, besides it was decided before the Amendment Act of 1862.

The tenant for life of leaseholds is bound to pay as between himself and the remaindermen the charges the lessee has to pay as between himself and the ground landlord: *Marsh* v. *Wells* (2); *Allen* v. *Embleton* (3); *In re Fowler* (4); and on the construction

(1) 3 De G. & J. 144.
(2) 2 S. & S. 87.
(3) 4 Drew. 226.
(4) 16 Ch. D. 723.

of the ground lease these expenses are to be paid by the tenant. *Crosse* v. *Raw* (1).

The test is, where is the obligation to pay imposed? The Amendment Act of 1862, ss. 96, 97, makes the expenses payable out of the rent through the occupier, and therefore throws the obligation on the person entitled to receive the rent.

Apart from the Acts, the words of the will include such incidental expenses as these.

Warmington, in reply.

PEARSON, J.:—

The question is whether the tenant for life is bound to allow these expenses out of her income, or whether as between tenant for life and remaindermen they ought to be apportioned in any and what way. The contention before me is that the tenant for life ought not at all events to pay all of the expense. That must depend on two things, the proper construction of the Acts, and also the construction of the testator's will. I will consider the Acts of Parliament first. I say Acts, because I consider the second Act throws a great deal of light upon the first. I find this as between the vestry and the persons entitled to the house—I use that word in the widest sense—the owners for the time being entitled for their own benefit, or as trustees, as the case may be, are liable to pay the whole sum, at all events in the first instance. Of course if the owner of the rack rent happens to be a trustee, although he may be liable in the first instance to make the drain, it was never the intention of the Legislature, nor is there in anything in the Acts to say, that he must pay out of his own property.

I cannot suppose it was the intention of the Legislature to interfere at all with the rights between a tenant for life and remainderman, if this Court on consideration of the whole case, though the tenant for life might have paid the whole, thought the expenses ought to be thrown either in whole or in part on some one else—with that the Act does not interfere; but, at all events in the first instance, the owner is bound to pay, and I treat the

(1) Law Rep. 9 Ex. 209.

PEARSON, J. Plaintiff as the person bound to pay, for I may dismiss the trustee from consideration.

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Now it is remarkable that under the first Act the only way in which these expenses, if incurred by the vestry through the default of the owner, could be recovered, was by summary proceedings before a justice, and I suppose that in course of time that was found to be ineffectual, and in the later Act the Legislature has provided that if there is a person entitled to the rack rent who has sub-let, the occupier is to pay, and is entitled to deduct whatever he pays out of the rent due from him, and it is provided further that if the expenses of making the drain exceed the rent due, the occupier cannot be made to pay the vestry more than the amount of rent due, so that in that case, if I have read the statute rightly, the vestry would be paid by instalments, and might go from time to time against the rent as it became due, and continue to receive it, giving notice not to pay the landlord till they are reimbursed in full; and as long as they are not paid the landlord could bring no distress or action for non-payment of rent. This house, I understand, is sublet, and in order to test the case, assuming that the rent is large and that one instalment was just sufficient to pay the expenses if the occupier had paid, then it is plain the tenant for life would get nothing by way of rent. Under those circumstances would it be possible to throw on the remaindermen any part of the expenses? It seems to me the Legislature having provided in what way the expenses are to be paid, this Court would not interfere: it would not say that although the deduction is to be made from the rent, and there is no rent in consequence, this Court ought to assume that the rent ought to be so much, and that the tenant for life is entitled to recover that amount from the estate.

But this case stands on even stronger grounds than that. There is no dispute that these expenses must be recouped to the ground landlord by the trustees. The will says "in trust, after payment of all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise, to pay" the income to the testator's widow for life. I confess I was much struck at first with the construction suggested that this was not an ordinary outgoing, but I think I came too hastily to the conclusion that it would not be

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included in this clause. And when you look at the second Act of Parliament, I think it is exceedingly difficult to say that it does not throw some light on the question, because it provides (sect. 97) for proportionate deductions by intermediate tenants at less than rack rent, and goes on, "Provided, also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner or occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

That must mean a right of this kind. It seems to me, therefore, that when the testator has said that all that his wife is to receive is the rent that remains after paying "all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise" at all events, the word "otherwise" is sufficient to cover this if the word "taxes" is not sufficient, but, looking to the form of the original lease of this house, I must come to the conclusion that the deduction will include whatever has been paid under that lease, and, under all these circumstances, though with some difficulty, I come to the conclusion that the tenant for life ought to bear these expenses.

Solicitor for Plaintiff: *J. F. Collins.*

Solicitors for trustees: *J. J. & C. J. Allen.*

D. P.

PEARSON, J.

1885

Jan. 20, 21;
Feb. 3.

WATSON *v.* YOUNG.

[1857 W. 69.]

Will—Construction—Remoteness—Divisible Gift—Gift to Children of A. who should attain Twenty-one—Period for ascertaining Class—Prior Trust for Accumulation of Income.

Devise of real estate to trustees in fee, upon trust for *J.* for life, and after his death upon trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age; but, in case there should be no child, nor the issue of any child of *J.* who should attain twenty-one, the property was to be held on trust for the child or children of *R.* who should respectively attain twenty-one, if more than one in equal shares. Provided always, that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of *R.* who should attain twenty-one. *J.* died without ever having had a child. *R.* had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation:—

Held, that the gift over to the children of *R.* was divisible into two distinct alternative gifts, viz., (1) a gift over in the event of there never being any child of *J.*; (2) a gift over in the event of no child or issue of any child of *J.* attaining twenty-one; and that consequently the first alternative was not too remote, and the gift over was in the events which had happened good.

Evers v. *Challis* (1) explained.

Stuart v. *Cockerell* (2) distinguished.

Held, also, that all the children of *R.* who were born during the period of accumulation, and who attained twenty-one, were entitled under the gift over.

Adjourned summons.

Joseph Stoddart by his will, dated the 24th of September, 1838, devised all his real estate to trustees in fee, upon trust by and out of the rents to pay certain annuities, and subject thereto he directed that the trust premises should be held upon the trusts following, viz., upon trust to pay unto or permit and suffer *John Watson*, the eldest son of *Robert Watson*, to receive and take the yearly rents thereof during his life, and as if he were tenant for

(1) 7 H. L. C. 531. (2) Law Rep. 5 Ch. 713.

life thereof without impeachment of waste, and from and after the decease of the said *John Watson* the testator directed that the trust premises should be held upon trust for his child, if only one, or all his children equally, if more than one, who should live to attain the age of twenty-one years, and for their respective heirs and assigns for ever. Provided always, that in case any one or more of the children of *John Watson* should die under the age of twenty-one years, leaving issue who should live to attain that age, then and in such case the share to which each such child so dying would, if he or she had attained the age of twenty-one years, have become entitled as aforesaid of and in the trust premises should be held in trust for such his or her issue, and if more than one for them equally, and for their respective heirs and assigns, but so nevertheless that such issue in their several degrees should take only after the decease and by representation of their respective parents. But in case there should be no child, nor the issue of any child, of *John Watson* who should live to attain the age of twenty-one years, then the testator directed that the trust premises should be held upon trust for the child or children of the said *Robert Watson* (other than *John Watson*) who should respectively live to attain the age of twenty-one years, if more than one for them in equal shares as tenants in common, and for their respective heirs and assigns. Provided always, that in case any one or more of the children of *Robert Watson* (other than *John Watson*) should die under the age of twenty-one years leaving issue who should live to attain that age, then and in such case the share to which each such child so dying would, if he or she had attained the age of twenty-one years, have become entitled as aforesaid of and in the trust premises should be held in trust for such his or her issue, if more than one for them equally, and for their respective heirs and assigns, but so nevertheless that such issue in their several degrees should take only after the decease and by representation of their respective parents. But in case there should be no child, nor the issue of any child, of *Robert Watson* who should live to attain the age of twenty-one years, then the testator directed that the trust premises should be held upon trust for other persons named in the will. Provided always that, subject and without

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prejudice to the trusts thereinbefore limited preceding the trust in favour of *John Watson*, the clear yearly rents and proceeds of the trust premises, after satisfying the said preceding trusts, should, during the term of twenty-one years computed from the day next before the day of the testator's death, be accumulated by way of compound interest, and the testator directed that such accumulated fund, together with all interest which should have accrued due in respect thereof, should, at the end of such period of accumulation, be added to and go as part of his residuary personal estate. And the testator directed that the clear residue of his personal estate should be held upon trust for the child, if only one, or all the children equally, if more than one, of *Robert Watson* who should attain the age of twenty-one. And the testator directed that in case any one or more of the children of *Robert Watson* should die under the age of twenty-one years, leaving issue who should live to attain that age, then and in such case the share to which such child so dying would, if he or she had lived to attain the age of twenty-one years, have become entitled as aforesaid of and in the testator's residuary personal estate should be held in trust for such of his or her issue, if more than one for them equally, and for their respective executors and administrators, but so nevertheless that such issue in their several degrees should take only after the decease and by representation of their respective parents. Provided also that *John Watson* and his issue should have or be entitled to no part or share whatever of and in the testator's residuary personal estate, if and in case there should be any other child or issue of *Robert Watson* who should live to attain the age of twenty-one years. And the testator directed the income of his residuary personal estate to be accumulated in the same way and for the same period as the rents of his real estate, and that the accumulated fund should at the end of the period of accumulation form part of his residuary personal estate.

The testator died on the 30th of October, 1849.

Robert Watson, who was the last survivor of the annuitants, died on the 24th of April, 1865.

John Watson died in 1855, under twenty-one and without issue.

The following other children of *Robert Watson* attained twenty-one.

Ann Watson, born on the 14th of August, 1840. She in 1857 married *G. H. Young*.

Mary Watson, born on the 5th of November, 1845. She married *G. F. May*, and died in June, 1878, intestate, without having had any issue, leaving her husband her surviving.

Frances Watson, born on the 16th of April, 1848. She married *Thomas Lee*, and died on the 10th of May, 1878, intestate, leaving her husband and four children her surviving.

Emma Watson, born on the 23rd of October, 1851. She married *George Brass*.

Robert Watson, the younger, born on the 16th of October, 1859.

Elizabeth Watson, born on the 23rd of January, 1862.

Robert Watson the father was the heir-at-law of the testator, and *Robert Watson* the younger was the heir-at-law of *Robert Watson*.

The suit was instituted for the administration of the testator's personal estate, and an administration decree was made soon afterwards.

The questions now raised, upon two summonses, one taken out by *Robert Watson* the younger, and the other by Mr. and Mrs. *Young* and Mr. and Mrs. *Brass*, were (1) whether the gifts over of the testator's real estate and the accumulations of the rents to the children of *Robert Watson* were void for remoteness; (2) if they were not void, at what date was the class of children of *Robert Watson* who were to take to be ascertained.

There was a fund in Court, resulting from accumulations of the rents of the real estate. *Robert Watson*, by his summons, asked that this fund might be paid out to him, and that he might be let into possession of the real estate. The other summons asked that one-sixth of the fund might be paid to Mrs. *Young* on her separate receipt, and another sixth to Mrs. *Brass* on her separate receipt.

Cozens-Hardy, Q.C., and *Leonard Field*, for Mrs. *Young* and Mrs. *Brass*:—

The gift over, in case there shall be no child, nor the issue of any child of *John Watson* who shall attain twenty-one, is not

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entirely void for remoteness, for it is separable into two distinct alternative gifts, viz., (1) in case there shall be no child of *John Watson*; and (2) in case there shall be no child or issue of a child who shall attain twenty-one. The first of these alternatives is clearly valid, inasmuch as it must happen during the life of *John Watson*, and this is the alternative which has happened.

Rawlins, for the representatives of Mrs. *May* and Mrs. *Lee*, and for *Elizabeth Watson*, adopted the same argument.

C. Herbert Smith, for *Robert Watson* the younger:—

The gift over is really on the happening of one event only—the failure of issue of children of *John Watson* who shall attain twenty-one, and that is too remote: *Stuart* v. *Cockerell* (1); *Proctor* v. *Bishop of Bath and Wells* (2); *Longhead* v. *Phelps* (3); *Monypenny* v. *Dering* (4); *Pearks* v. *Moseley* (5).

Cozens-Hardy, in reply:—

The gift over is clearly separable into two: *Evers* v. *Challis* (6).

C. Herbert Smith, in reply:—

Evers v. *Challis* depends entirely on the rules of law which apply to contingent remainders.

Feb. 3. PEARSON, J. (after stating the provisions of the will, continued):—

The question turns upon the gift over. *John Watson* had no child. Thereupon the persons entitled under the gift over claim the property. It is said, on the one hand, that the gift over is void for remoteness, because it is a gift in case there shall be no child, nor the issue of any child, of *John Watson* who shall live to attain the age of twenty-one years, which, of course, might not happen during a life in being and twenty-one years after. On the other hand, it is said that the gift over comprises in itself a gift over if there shall never be any child of *John Watson*, and if the gift had been in express words: "but in case there shall be

(1) Law Rep. 7 Eq. 363; 5 Ch. 713.
(2) 2 H. Bl. 358.
(3) 2 W. Bl. 704.
(4) 2 D. M. & G. 145.
(5) 5 App. Cas. 714.
(6) 7 H. L. C. 531.

no child of *John Watson*, or in case there shall be no child, or issue of any child, of *John Watson* who shall live to attain twenty-one years," it is plain that there then would have been two alternatives, and, the alternative of there never being a child of *John Watson* having happened, the gift over would have been good.

It was argued that the case comes within that class of cases of which *Stuart* v. *Cockerell* (1) is an example. But in *Stuart* v. *Cockerell* the gift over never had a chance of being good, even if it had been "in case there shall be no child," because there were children. In the next place, the gift was after the death of three persons named "unto all and every the children of my said nephew, Sir *Simeon Stuart*, share and share alike, if more than one, and if but one, then to such one child, and the child or children of such of the children of the said Sir *S. Stuart* as shall be then dead, according to the *Statute of Distribution of Intestate's Estates*, but, in case there shall be no child or grandchild of the said Sir *Simeon Stuart* then living, then upon trust to pay and transfer the said government securities" unto other persons. Of course the question might have been raised, what was the meaning of that clause if there had been no child at all of the nephew, but, inasmuch as one of the persons claiming was a child of the nephew, it would not have answered his purpose to raise that contention. The contention actually raised, and the only contention which could (I will not say with any hope, because there was no hope at all in the case, but with any shadow of hope) be raised was that which was raised by the learned counsel for the appellant, viz., that it was not a gift to such of the children of Sir *Simeon Stuart* as should be living at the period of division, and the children of such of them as should be then dead, but a gift to all the children of Sir *Simeon Stuart*, with gifts over to the children of those children who should be then dead leaving children. However, the Court came to the conclusion that it was perfectly impossible to read the gift except as a gift to a class.

But the case which seems to me to govern the present case is *Evers* v. *Challis* (2), a case of the highest authority, because it came first before the Court of Queen's Bench, and then before the Court

(1) Law Rep. 5 Ch. 713. (2) 7 H. L. C. 531, 534.

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of Exchequer Chamber, and was finally decided in the House of Lords, who overruled the decision of the Exchequer Chamber. There the gift was to the testator's son and daughters for life, and a gift over to such of their children as, being sons, should attain the age of twenty-three, or, being daughters, should attain the age of twenty-one, and then there came the gift over upon which the whole thing turned: "In case of the death of my said son, or either of my said two daughters, without leaving a child, if a son, who shall live to attain the age of twenty-three years, or if a daughter, who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons, living to attain the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years" and so forth. And Baron *Alderson* said (1): "Now here there are not the two events which were separately and distinctly mentioned in the former devise over. The event, if she shall have no children, is not mentioned in terms at all. The question between the parties is, whether this devise over be void or not. It may be well admitted that the testator intended to include in these words two events: first, the event of *Ann* having no child at all; for, certainly, if she never had a child, she must die without leaving a son who could attain twenty-three or a daughter who could attain twenty-one; but, secondly, he also intended to include in these same words the compound event of her having a child and that child dying under the prescribed age;" and then the Court of Exchequer Chamber came to the conclusion that they could not separate the devise into two alternatives, because they said that that had never been done where one of the alternatives contained illegal limitations. The Court of Queen's Bench had decided that they could split the gift into two alternatives, and that, inasmuch as the alternative which was within the legal limits had happened, the devise over could take effect. Mr. Justice *Wightman*, in giving the opinion of himself and several of his brother Judges, who were summoned to advise the House of Lords, after referring to *Leake* v. *Robinson* (2), which was a case of the same class as *Stuart* v.

(1) 18 Q. B. 247.

(2) 2 Mer. 363.

Cockerell (1), said (2): "But the present case is upon this point clearly distinguishable; and the limitation over seems to be in its nature divisible, the having no child at all being one contingency, and the having a child which, if a son, does not reach the age of twenty-three, or if a female, twenty-one, being the other. In *Doe* v. *Selby* (3) it was held that an estate might be devised over in either of two events, and that in one event the devise may operate as a contingent remainder, and in the other as an executory devise, and the Court of Queen's Bench in the judgment in the present case considers that it was governed by the case of *Doe* v. *Selby*. It is admitted by the Court of Exchequer Chamber that, by the words used by the testator in the limitation over, he intended to include two events, first, the event of *Ann* never having a child at all, and the compound event of her having a child, and that child dying within the prescribed age. The first event, if it stood alone, was legal. The second event was too remote to take effect according to law. The Court of Exchequer Chamber, however, was of opinion, that the testator included all these events, some legal, others illegal, in one class, and that the Court could not separate them; that the true meaning of the clause was, 'in any event which can happen in which *Ann* dies leaving no child, who, if male, attains twenty-three years, or if females, twenty-one, I give the estate over.' The whole question, therefore, as before observed is, whether the clause for carrying the estate over is divisible or not. If it is, the appellants ought to succeed, if not, the respondents ought to succeed. The terms used in the limitation over include two contingencies; would there have been any real difference if the terms had been, to *Ann* for life, with remainder to her children in fee, and if she have no child, or if she have a child who, if a son, shall not attain twenty-three years, or, if a daughter, who shall not attain twenty-one years, then over? In such case it can hardly be doubted but that the estate would be devised over in either of two events, and that in one event the devise over would be good as a remainder, though the second alternative would be objectionable as an executory devise on the ground of remoteness." Then he referred to other cases, and

(1) Law Rep. 5 Ch. 713. (2) 7 H. L. C. 545.
(3) 2 B. & C. 926.

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concluded (1): "We are, therefore, of opinion, for the reasons we have given, that the Court of Exchequer Chamber was wrong in holding that the contingencies in the limitation over could not be separated; and as that was the ground of the decision, it is unnecessary to enter into the consideration of various points which were made, and cases which were cited upon the argument before your Lordships, as we think that the devise was divisible, and that the judgment of the Court of Queen's Bench was right, and that the will contained a valid devise on the death of *Ann* to the children of *John* and *Sarah* of the property originally given to *Elizabeth*, *Maria*, and *Ann* respectively, for their lives."

I confess I cannot distinguish that case from the present case. It seems to me clear that if I were to insert in the present will the words which Mr. Justice *Wightman* inserted in that will, I should have a gift over in case *John Watson* never had a child, or, in case of his having a child, if no child or issue of any child should live to attain the age of twenty-one years. I must, therefore, hold the gift over to be good.

It was urged that the decision in *Evers* v. *Challis* (2) depended on the fact that it related to a contingent remainder. I cannot see that it did. For the purpose of considering whether the clause contained terms which were divisible, it was wholly immaterial whether there was a contingent remainder or not. And, whatever may have been the rule in former days, still less can it be of importance now, when the Legislature has, by the Act 40 & 41 Vict. c. 33, carefully provided against the failure of a contingent remainder by the failure of a prior particular estate, by enacting that whenever that is likely to happen the contingent remainder is to be treated as an executory devise.

I, therefore, decide that the devise over is good, and must take effect accordingly.

Cozens-Hardy, Q.C., and *Leonard Field*, for Mrs. *Young* and Mrs. *Brass*:—

The question now arises, at what period the class of children of *Robert Watson* who are to take is to be ascertained. It ought to be ascertained at the latest when the first child attained twenty-

(1) 7 H. L. C. 547. (2) 7 H. L. C. 531.

one, *i.e.*, on the 14th of August, 1861. This will exclude *Elizabeth Watson*, who was not born till the 23rd of January, 1862.

C. Herbert Smith, for *Robert Watson* the younger, referred to *In re Emmet's Estate* (1); *Jarman* on Wills (2).

Rawlins, for *Elizabeth Watson*:—

The rule that, when there is a gift to a class of children, the class shall be incapable of being increased so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, is, as *Jessel*, M.R., said (3), a mere rule of convenience, and it does not apply to a case like the present, where no child could call for its share until the end of the period of accumulation, which was not till long after the birth of *Elizabeth*. The rule is one which is clearly opposed to the intention of the testator.

Cozens-Hardy, in reply:—

An exception from this general rule has been admitted where there is a prior life estate, but a trust for accumulation during a term is an entirely different thing from a life estate.

[PEARSON, J., referred to *Gillman* v. *Daunt* (4).]

PEARSON, J.:—

The rule in question depends upon no principle whatever, but is simply a rule of convenience, and no doubt the Judges before whom it has come have felt that in many cases it pressed very hardly, because it excludes children intended by the testator to take. But the exclusion is simply, as it is said, in order to arrive at a result which is less inconvenient than extending the period during which the class is to be formed. But, in the present case, where there is an accumulation directed, and no one can, therefore, enter into the actual enjoyment of his share until the period of accumulation has come to an end, I do not see that there is any consideration of convenience, or of lesser inconvenience, which obliges me to shut up the class until the

(1) 13 Ch. D. 484.
(2) 4th Ed. vol. ii. p. 160.
(3) 13 Ch. D. 490.
(4) 3 K. & J. 48.

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period of accumulation comes to an end. So far as I can judge from the expressions used by the Judges in other cases, they seem to be of opinion that the period which closes the class is the period when the first member of the class becomes entitled to the actual possession or enjoyment of his share. I hold, therefore, that all the children born during the period of accumulation can take.

Solicitors: *Field, Roscoe, & Co.*, agents for *George Maw, jun., Bishop Auckland; J. & W. Maude*, agents for *J. W. Mellor, Oldham;* and for *W. Robinson, Darlington.*

W. L. C.

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[1883 T. 854.]

Administration of Assets—Trust for Payment of Debts—Exoneration of General Personal Estate.

The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies to a case where a charge for payment of debts after the grantor's death is created by deed. But no such rule applies to specific personal estate given on similar trusts; in such a case the specific personal estate will be the primary fund for the payment of the debts.

A testator by a deed executed in his lifetime conveyed and assigned real and personal estate to trustees, in trust for himself during his life, and after his death to sell and convert the property, and to stand possessed of the proceeds on trust, after payment of costs, to pay all the debts which should be due from him, and his funeral expenses, and, after such payment as aforesaid, upon trusts for his sons and their children. By his will the testator, after reciting the deed, devised and bequeathed all and every the residue of his real and personal estate not comprised in and subject to the trusts of the deed, to his wife for her life, with remainders over, and he appointed his wife and one of the trustees of the deed executors of his will, which was proved by the widow and one of the trustees:—

Held, that, as regarded the real estate comprised in the deed, the testator's general personal estate was not exonerated from its primary liability to pay his debts.

But *held*, that the personal estate comprised in the deed was the primary fund for the payment of the debts.

French v. *Chichester* (1) discussed and explained.

ADJOURNED SUMMONS.

By a deed dated the 12th of July, 1861, and made between

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

John Trott of the first part, *John Henry Ackworth Trott* of the second part, *William Frederick Trott* of the third part, and *Richard Prall* and *George Buchanan* of the fourth part, for the considerations therein mentioned *John Trott* appointed and conveyed unto *Richard Prall* and *George Buchanan*, their heirs and assigns, certain specified real estate, including hereditaments vested in him as mortgagee, to hold the same unto and to the use of *Prall* and *Buchanan*, their heirs and assigns (subject as to part thereof to a specified mortgage) upon the trusts thereinafter declared. And by the same deed *John Trott* assigned unto *Prall* and *Buchanan*, their executors, administrators, and assigns, certain leasehold property vested in him as lessee or mortgagee, sums of money in the public stocks, and sums of money secured to him under the mortgages of the premises therein respectively comprised, and certain annuities and rent-charges, To hold the said leasehold hereditaments and premises unto *Prall* and *Buchanan*, their executors, administrators, and assigns, for all the unexpired residue of the term or terms of the said *John Trott* therein, subject nevertheless to the payment of the rents and to the observance and performance of the covenants affecting the same respectively, nevertheless upon and for the trusts thereinafter declared; and to hold, receive, and take the said moneys, stocks, annuities, and rent-charges upon the trusts thereinafter declared. And it was thereby declared and agreed that *Prall* and *Buchanan*, their heirs, executors, administrators, and assigns, should stand seised and possessed of the said freehold and leasehold hereditaments, moneys, stocks, and annuities, according to the nature and quality thereof respectively, upon trust to permit *John Trott* to receive the income thereof during his life, and after his decease upon trust to sell the freehold and leasehold property, and to sell, call in, and convert into money the stocks, moneys invested on mortgage, and other personal estate, and to stand possessed of the proceeds, upon trust, in the first place, to pay the costs, charges, and expenses of the trustees in the execution of the trusts of the deed, and in the next place to pay, satisfy, and discharge all the mortgage debts, debts due on bonds, bills, or notes, and all debts on simple contract, which should be due and owing from *John Trott* to any person or persons whomsoever, and also to defray his funeral expenses, and, after

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such payment as aforesaid, upon trust to pay one moiety thereof unto *John H. A. Trott*, and the other moiety thereof unto *William F. Trott*. Provided that if either of them, the said *John H. A. Trott* or *William F. Trott*, should die in the lifetime of *John Trott* then the share of him so dying should be held by the trustees upon trust for the child or children of him so dying; such children, if more than one, to take the said share in equal shares. The deed contained a power for the trustees to sell the freehold and leasehold hereditaments during the life of *John Trott*, with his consent, and to invest the proceeds of sale in the purchase of other freehold and leasehold hereditaments, to be assured to the trustees and held by them upon the trusts of the deed. And there was a power of appointing new trustees. *John H. A. Trott* and *William F. Trott* were the two sons of *John Trott*. Part of the property comprised in the deed was sold during the life of *John Trott*, and other property was purchased by the trustees with the purchase-money and conveyed to them. *William F. Trott* died on the 15th of December, 1873, leaving three children. *John Trott* died on the 5th of March, 1883, having made his will, dated the 9th of March, 1876, by which, after a recital that by an indenture of conveyance and assignment dated the 12th day of July, 1861, he conveyed and assured certain freehold and leasehold premises therein described to *Richard Prall* and *George Buchanan*, and their heirs, executors, administrators, and assigns, according to the natures and tenures thereof, upon the trusts in the said indenture mentioned (amongst which trusts was a trust to pay all just debts due from him at his decease, and his funeral expenses) and that since the execution of the said indenture he had conveyed and assured several other properties not comprised therein unto *Prall* and *Buchanan*, and their heirs, executors, administrators and assigns, according to the natures and tenures thereof, upon and subject to the trusts of the said indenture, he thereby gave, devised, and bequeathed all and every the residue of his real and personal estate, whatsoever and wheresoever situate, not comprised in and subject to the trusts of the indenture of settlement (except any real estate vested in him as trustee or mortgagee) unto his wife *Hannah*, during her life; and from and immediately after her decease, he gave, devised, and

bequeathed the same unto his granddaughter *Hannah Fredericka* (daughter of his son *John H. A. Trott*) for her own use and benefit absolutely. But, in case she should die in the lifetime of his wife, then and in such case he gave, devised, and bequeathed all and every the residue of the real and personal estate aforesaid unto his wife for her own use and benefit absolutely. And the testator appointed his wife and *George Buchanan* and *John Thomas Prall* executrix and executors of his will. The will was proved by the widow and *Buchanan* alone.

This action was brought by the children of *William F. Trott* against the trustees of the deed of the 12th of July, 1861, claiming to have the trusts of the deed performed and carried into execution, and the real and personal property comprised in it ascertained and administered by and under the direction of the Court. *John H. A. Trott* was also made a Defendant. On the 6th of August, 1883, judgment was pronounced declaring that the trusts of the deed ought to be performed and carried into execution, and ordering the same accordingly, and it was ordered that certain inquiries and accounts should be made and taken. By the certificate of the Chief Clerk it appeared that the only property remaining subject to the trusts of the deed was real estate, or moneys produced by the sale of real estate. A summons was taken out by the Plaintiffs raising the question whether the executors of the testator were entitled to be recouped out of the trust property certain debts of the testator which they had paid out of his personal estate. The Plaintiffs contended that, notwithstanding the deed, the personal estate was the primary fund for the payment of the testator's debts.

Cookson, Q.C., and *A. C. Eddis*, for the Plaintiffs:—

It is not sufficient to exonerate personal estate from its primary liability to pay debts, that some other property is expressly charged, either by a will or some other instrument, with the payment; but an express intention, not only to charge the other property, but also to exonerate the personalty, must be gathered from the instruments: *Collis* v. *Robins* (1). That is not so here. The case is exactly the same as *French* v. *Chichester* (2). The

(1) 1 De G. & Sm. 131. (2) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

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reports of that case are meagre, but when the decree and the pleadings are looked at it will be found that the facts of the two cases are identical.

Higgins, Q.C., and *Whiteway*, for the executors :—

This is a peculiar case, and is distinguishable from *French* v. *Chichester* (1).

The hearing was adjourned to enable the Judge and the counsel to see the terms of the decree in *French* v. *Chichester* (2), and the

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

(2) FRENCH *v.* CHICHESTER.

FROM the recitals in the decree, dated the 1st of February, 1703 [Entry Book of Decrees and Orders (Chancery), 1703, A., fol. 312], it appears that *John Chichester*, as executor of his father, became liable to pay (as a debt of his own) certain portions given by the father's will to his younger children, among which was a portion for his daughter *Susanna*; that *John Chichester* paid all the portions, except *Susanna's*, who was not then of age; that *John Chichester* being considerably indebted, did convey all his manors and lands in *Devon*, *Cornwall*, and *Exeter* to certain trustees, to the use of himself in tail, and as to part of the trust estate to the use of *Dorothy* his wife, in augmentation of her jointure, and limited a term of years to his said trustees for payment of his debts, and afterwards to *Francis Chichester* for life, with power to make leases, remainder in tail to all the sons of the said *Francis*, and for want of such issue to *Arthur Chichester*, with remainder to all his sons in tail male, with divers remainders over; that *John Chichester* some time after died, leaving a great personal estate, having made his will, and the said *Dorothy* his wife executrix thereof, who possessed herself of the said testator's personal estate and entered upon the trust estate settled by Sir *John Chichester*, and soon after intermarried with *Henry Chichester*, who thereupon received the profits thereof until the death of *Dorothy*, *Francis Chichester* being the heir of *John Chichester*, and having been compelled by a decree in Chancery at the suit of *Susanna* to pay the £1000 portion to her. The present suit was originally by *Francis Chichester* against *Henry Chichester*, *Susanna Chichester*, and others, and was after the deaths of *Francis* and *Henry* revived by the executors of *Francis* against the executrix of *Henry Chichester* and her husband, and the decree directed (*inter alia*) that the Plaintiffs should be reimbursed by the Defendants what *Francis Chichester* had paid to *Susanna* for her portion, interest, and costs. The Defendants afterwards exhibited a bill of review of this decree, the hearing of which on demurrer on the 18th of January, 1706, is reported 2 Vern. 568, and it is there stated that "the Lord Keeper *Wright*, upon the former hearing, and the present Lord Keeper, on the bill of review, were both of opinion, that the devise being in the same clause in which she was named executrix, and not said free and exempt from payment of debts; she must therefore take it as

cases presented by the parties to the House of Lords on the appeal.

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Jan. 13. *Higgins*, Q.C., and *Whiteway*, for the executors:—

[PEARSON, J.:—After looking carefully at the decree in *French* v. *Chichester* (1), and the cases presented to the House of Lords, I find it difficult to draw a hair's breadth's distinction between that case and the present. All the Courts held in that case that the personal estate had not been exonerated.]

In *Stapleton* v. *Colvile* (2) real estate was charged by will with the payment of the testator's debts due at his decease, and it was held that the personal estate was exonerated. And Lord *Talbot* expressed himself (3) as not entirely satisfied with the decision in *French* v. *Chichester*. In the present case the testator has by his will shewn the clearest possible intention of abiding by the settlement, both by the recital of the settlement, and by the form of the residuary gift. The question is not between real and personal

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executrix, and the same must be applied to the payment of debts; and therefore allowed the demurrer, and dismissed the bill of review."

The Defendants afterwards appealed to the House of Lords, and the hearing of the appeal on the 13th of February, 1707, is reported 3 Bro. P. C. (2nd ed.) 16, from which report it appears simply that the appeal was dismissed.

The printed case of the Appellants presented to the House of Lords (Cases in the House of Lords, vol. iv. p. 61, preserved in the Library of *Lincoln's Inn*), stated as one of the reasons for the appeal, "For that by *John Chichester's* deed of trust (by which deed the Respondent *Chichester* claims the estate of *John Chichester*) it appears that *Susanna's* demands ought to be a charge thereon, and that the personal estate ought to be enjoyed by *Dorothy*, discharged of *Susanna's* portion, according to *John's* said trust, and the rather because *Dorothy* had parted with a considerable estate of her own to pay *John's* debts." The case of the Respondents (Ibid. p. 65), contained the following statement:—"It will be objected, that *John Chichester* by deed settled lands in trust for payment of his debts, and that therefore the debt in question ought only to remain charged on his real estate, and his personal estate ought to be exempted therefrom. Answer. Though *John Chichester* did make a security out of his lands to pay his debts, yet that discharges not his personal estate, which still continues liable, and shall come in aid of the real estate; and the Respondents insist there is no case wherein it has been otherwise ruled, upon the like reason and circumstances."

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

(2) Cas. t. Tal. 202.

(3) Ibid. 209.

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estate, but between the trust fund and the residuary personal estate. The settlement includes personal estate as well as real.

[PEARSON, J., referred to *In re Ovey* (1).]

That case has no application; the question does not turn merely on the form of the residuary gift; the question is whether there is a plain indication of the testator's intention: *Collis* v. *Robins* (2).

[PEARSON, J.:—In *Stapleton* v. *Colvile* (3) the trust was contained in the will itself.]

Here the recital of the deed in effect incorporates its provisions into the will. The Plaintiffs claim under the deed, and it only gives them what remains after payment of the settlor's debts. It now appears that the Courts have been for nearly 180 years in ignorance of the real grounds of the decision in *French* v. *Chichester* (4). It has always been treated as based on the fact that the gift of the remainder of the personal estate to the testator's wife was contained in the same clause in which she was named executrix, and that therefore she must take it as executrix, and it must be applied in payment of debts: *Jarman* on Wills (5).

[PEARSON, J.:—The decision has never been dissented from. Lord *Talbot* only said that he did not understand the facts as they were reported.

Cookson, Q.C.:—Apparently he was not aware of the appeal to the House of Lords.]

The reason for the decision was not known.

The *onus* of shewing the exoneration is no doubt on the executors, but they have discharged it. In *French* v. *Chichester* there was no personal estate comprised in the deed.

Stirling, for the trustees of the deed.

J. G. Laing, for the son *John H. A. Trott*.

(1) 20 Ch. D. 676; S.C. *sub nom.* *Robertson* v. *Broadbent*, 8 App. Cas. 812.
(2) 1 De G. & Sm. 131.
(3) Cas. t. Tal. 202.
(4) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.
(5) 4th Ed. vol. ii. p. 661.

PEARSON, J. (after stating the facts) :— PEARSON, J.

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No doubt the general rule of law is that the personal estate of a testator is liable, in the first instance, to the payment of his debts and funeral and testamentary expenses, unless it is exonerated, either by express words or by what has been called necessary implication, that is, an indication of intention so strong that the Court is compelled to say that it is judicially satisfied that it was the intention of the testator to discharge his personal estate. The peculiarity of the present case is that the trust deed appears to indicate that the testator's intention was that the property comprised in it should be charged with the payment of his debts and funeral expenses in priority to the trusts thereby created in favour of his sons and their children. But is that enough to discharge the testator's general personal estate? It seems to me that the case of *French* v. *Chichester* (1), when it is carefully examined, is as nearly identical with the present case as it is possible for one case to be with another. The statement of the facts of that case as given in 2 Vern. 568, is very meagre. But there are fortunately preserved in *Lincoln's Inn* Library the cases both of the appellants and the respondents upon the appeal to the House of Lords, and I have referred to those cases, because the facts are much more fully stated in them. The report in 2 Vern. states that the Lord Keeper held "that, the devise to the testator's wife being in the same clause in which she was named executrix, and not said free and exempt from payment of debts; she must therefore take it as executrix, and the same must be applied to the payment of debts." But the question whether the testator's personal estate was exonerated by virtue of the deed which he had executed conveying real estate to trustees on trust for the payment of his debts, was raised by the cases both of the appellants and the respondents in the House of Lords. It is stated in the respondents' case by way of objection and answer. In my opinion the reasons appended to a case of this kind are of the greatest importance when we have to consider what were the points urged before the House of Lords, and there is no report of the arguments there, because these reasons shew what points were intended to be raised. It is to be observed that not

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

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a word is said in those reasons about the wife's taking the personal estate as executrix. The report in 2 Vern. states that which does not appear in the recital of the deed in the decree, that the trust was for the payment of the testator's "debts, legacies, and funerals." Consequently, the deed in that case contained all the words which are contained in the deed in the present case. The nature of the deed appears from the recital of it in the original decree. [His Lordship read the recital in the decree.] It appears that by that deed provision was made for the payment of the testator's debts, legacies, and funeral expenses out of the trust property, and it was only subject to that payment that the surplus was given over to beneficiaries, just as in the present case the surplus is given over to the testator's two sons. I find it, therefore, impossible so far to discover any distinction between the two cases, and, if I had any doubt about the correctness of the decision, and there was nothing else in the present case, I should feel myself bound by *French* v. *Chichester* (1), which is a decision of the highest tribunal, to hold that the personal estate of the testator in the present case is not exonerated from the payment of his debts.

But Mr. *Higgins* has very properly argued that the personal estate is exonerated by reason of the recitals in the will and the form of the residuary gift. Is that so? It is not contended that there is any express exoneration, and the question is whether there is in the will any indication of an intention to exonerate it. I am unable to find any indication of such an intention; on the contrary, I think I should be going contrary to the express words of the will if I were to hold that there is the slightest indication of an intention to exclude the ordinary rule of law as to the payment of debts. The testator does not, as he might have done, give to his wife all his real and personal estate not comprised in the trusts of the deed, but he gives her all the residue of his real and personal estate not comprised in the trusts of the deed. There is not a single previous gift in the will. It is not, therefore, a gift of the residue after deducting previous gifts, but still it is a gift of "residue." To my mind this can mean nothing else but the residue after making those deductions which by law ought to be made. The words are so strong as to exclude

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

any inference that the testator intended to interfere with the operation of the ordinary rule of law that personal estate is the primary fund for the payment of debts, or that he intended the trust property to be employed in the exoneration of the personal estate. I hold, therefore, that the personal estate is not exonerated.

Stirling:—The mortgage money included in the deed appears to have been called in.

PEARSON, J.:—At the death of the testator it appears that the trust property consisted only of real estate. That is the material time.

Feb. 4. After this decision had been given it was discovered that two mortgage debts of £1000 and £80, which were comprised in the deed, had been paid off, and the money had been invested in the purchase of real estate, which formed part of the real estate which at the death of the testator was subject to the trusts of the deed. The deed did not contain any power to invest the mortgage debts comprised in it in the purchase of real estate. The question was now argued how the real estate, so far as it represented these two mortgage debts, ought to be applied.

Cookson, Q.C., and *A. C. Eddis*, for the Plaintiffs:—

The principle of *French* v. *Chichester* (1) applies to the real estate which represents these mortgage debts, just as it does to the other real estate subject to the trusts of the deed. That principle is not limited to real estate. The testator's intention was that the trust property should be liable to pay his debts only in aid of his general personalty. The dedication of property by a trust of this kind resembles a specific devise or bequest. The question is really one of intention, and there is nothing to shew that the testator intended to exonerate his general personal estate. The fact that he permitted the investment of the mortgage money in real estate indicates an intention that it should be treated as real estate.

Higgins, Q.C., and *Whiteway*, for the executors:—

French v. *Chichester* does not apply; the principle applies only

(1) 2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16.

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to real estate. The personal estate comprised in the deed is primarily liable to the payment of the debts, and the real estate which represents the mortgage money must be treated as personal estate. There is no reason why a man should not appropriate a particular part of his personal estate to the payment of his debts. There is a technical rule as to real estate, and it is necessary to shew an intention to depart from it, but that rule has no application to personal estate.

Feb. 11. PEARSON, J.:—

On the former occasion, when it was supposed that nothing but real estate remained subject to the trusts of the deed, I decided that the general personal estate of the testator was not exonerated from the payment of his debts, but that it must be applied in paying them before the real estate comprised in the deed. It now appears that some of the property comprised in the deed, though in the form of real estate, is to be considered as personal estate, and the question I have to decide is whether the general personal estate of the testator is exonerated by personal estate comprised in the deed, or whether the personal estate subject to the deed ought to contribute rateably with the general personal estate to the payment of the debts.

I am not aware of any authority which makes general personal estate the primary fund for the payment of debts as against personal estate specifically appropriated to that purpose. I confess I should have thought, but for the technical rule of law as to real estate, that when a testator has created a trust for the payment of his debts, he must be taken to mean that the trust property, whatever it is, is to be applied in the first instance in the payment of the debts, so as to exonerate his other property. As regards real estate, however, that cannot be so, by reason of the rule of law which says that the personal estate is to bear the debts, unless the testator has, in so many words, or by some expression of intention of the strongest kind, said that it is to be otherwise. I do not, however, understand that that rule applies to personal estate. And, inasmuch as I find in the will a positive recital of this deed, with a declaration that the trusts of it were for the payment of the testator's debts, and an express gift to the

widow of the residue not comprised in the deed, I come to the conclusion that the intention of the testator was that the personal estate comprised in the deed was to be the primary fund for the payment of his debts.

Solicitors: *A. D. Smith & Eldridge; Nickinson, Prall, & Nickinson*, agents for *Prall & Son, Rochester; Rodgers & Clarkson.*

W. L. C.

In re WILSON. ALEXANDER *v.* CALDER.

[1883 W. 4397.]

Practice—Administration—Rules of Supreme Court, 1883, *Order* LV., *rr.* 3, 10 —*Infants.*

Discussion of the principles on which the Court will act in the exercise of its discretion under Order LV., r. 10, whether or not to make a general order for administration.

THIS was a summons under Order LV., r. 3, to administer the trusts of the will and codicils of the late *David Wilson*, who died in December, 1880; and also of a settlement he had executed in his lifetime.

The Plaintiffs were Mrs. *Alexander*, a daughter of the testator and six of her children, all infants, by their father as next friend. The Defendants were the four trustees of the testator's will, who were also the trustees of the settlement. The testator gave legacies of £5000 each to the six infant Plaintiffs, a seventh child of Mrs. *Alexander*, and to two other of his grandchildren, to be set apart and retained by his trustees for the benefit of his grandchildren in manner directed; he gave legacies of £1500 to each of his two sons, and after appropriation of the legacies to his grandchildren, he gave his residue to his trustees upon trust for sale and conversion, and to pay one-fourth of the income to each of his four children, and after his or her death to apply half the income of the fourth share for the maintenance of his or her children, and to accumulate the other moiety until the death of the survivor of his sons and daughters, when the capital was to be divided among all his grandchildren then living who, being sons,

PEARSON, J. 1885 *In re* WILSON. ALEXANDER *v.* CALDER.

should attain twenty-one, or being daughters should attain that age or marry; the will contained power to postpone the sale and extensive powers of management, and gave the trustees salaries for management, and there was a direction that until each of his four children should be in receipt of an income of £1500 per annum from the residuary estate there should be paid to each child such sum as would make up the £1500. The testator left two sons and two daughters surviving him and eleven grandchildren, the seven children of the Plaintiff, Mrs. *Alexander*, and four others. The testator had executed a settlement in his lifetime of a part of his estate, by which he reserved to himself a power of appointment among his children and issue. He exercised that power by his will, in such manner that except in the case of a remote contingency the settled property would be subject to the same trusts as those of his will. The legacies of £5000 had not yet been appropriated. Accounts had been rendered by the trustees, and they had been examined by a professional accountant, but there were differences as to the proper mode of taking the accounts, and especially as to the adjustment of payments as between income and capital. The Plaintiffs and one trustee desired an order for administration. The other trustees, supported by the tenants for life other than Mrs. *Alexander*, objected to having an order for general administration.

Cozens-Hardy, Q.C., and *C. Browne*, for the Plaintiffs, and

Higgins, Q.C., and *Ashton Cross*, for one trustee:—

In such a complicated case as this, where the property is tied up for so long a period, where there is outstanding property of a hazardous nature, where infants are entitled to a large part of the trust property in remainder, and where questions of a difficult nature have already arisen, and a large part of the beneficiaries and one trustee desire a general administration order, such order is proper, and there is nothing in the new practice to prevent its being made.

Romer, Q.C., and *De Castro*, for the other three Defendants:—

There is no occasion to make a general order for administration. There is no difficulty in getting every question that arises

in the administration decided as it arises. The testator has made every provision for the management of his trust property, and has chosen the trustees he wished to carry his directions out. This is one of the cases aimed at by the new rules, which take away the absolute right of beneficiaries to have an administration order.

PEARSON, J.:—

The testator appears to have been a man of very great wealth, and his property at the time of his death was invested in a great number of adventures, as to which it appears plainly upon the face of the will, no less than upon the arguments of counsel, that they required very careful management that they might be made productive to the fullest extent for the benefit of those who took under his will.

I need say very little upon the settlement. Mr. *Wilson*, of course, could not alter the trusts, and although to a certain extent he may be said to have blended the funds under the settlement and the funds under the will substantially in the same way, the trustees have very properly kept the accounts separate.

The will and codicils are drawn with almost a superfluity of care. The testator was anxious, as far as he could, to provide for every contingency which he thought might happen. He foresaw, very prudently, that if his estate was to be made as valuable as it could be made to those who were to take it, it would require many years' nursing for that purpose, and he has manifestly provided for that under his will by giving minute directions as to the manner in which the property is to be superintended by the trustees whom he appoints, and by giving them the fullest powers for the management of the various kinds of property which he knew would fall in to their care. Nor, is there any complaint really made against the trustees that they have not diligently and honestly and scrupulously done their duty since the death of the testator?

[His Lordship referred to a power of appointing a deputy given by the testator to his trustees, and proceeded:—]

I cannot help thinking that any difference that there may be now in the family, either between members of the family *inter se*

PEARSON, J. 1885 *In re* WILSON. ALEXANDER *v.* CALDER.

or between them and the trustees, has arisen to some extent from that power of attorney being so given.

The circumstances being then such as I have stated, this originating summons is taken out by Mrs. *Alexander* and her children who are infants, and it asks for a general administration of the trusts both of the post-nuptial settlement and of the will and codicils of the testator. That is resisted, and it is resisted on this ground. It is admitted that according to the old practice of the Court of Chancery such a decree could not have been opposed; it would have been a mere matter of course, but it is said that under the very useful orders that are now the guide of the Court, under Order LV., rule 10, this Court has the right to refuse any such order, and that this is a case in which the Court ought to refuse such an order. Rule 10 is this: "It shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order." Now let me see to what cases that rule is intended to apply. There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit. There were no means, according to the old practice, of bringing isolated questions under a will before the Court for its determination except by an administration suit. It was felt that that very often involved parties in an amount of expense which was unnecessary, and which they ought to be relieved from; and accordingly this order was framed: purposely to enable parties, whether trustees or executors or beneficiaries, to come to the Court and ask the Court for the simple determination of one or more questions arising under a will, and without asking the Court or requiring from the Court that the whole estate should be administered. And it will be seen that this order relates to cases where that summary course can be pursued without

any administration of the estate, because the rule itself expresses it. The rule, as I understand it, is this, that if there be a simple question—as to whether or not a legacy has failed: as to whether or not the proper construction gives it to the survivors as a class, or does not give it to the survivors as a class, or any question of that kind; or even if there be a question as to whether or not some part of the property which has been realized ought to be treated as income or capital, or any isolated question of that kind, the decision of which would at once set at rest all differences between all the parties taking under the will, the Court then ought not to give a judgment for the general administration of the estate, but ought to decide those questions separately and apart from any administration.

But surely a rule of this kind cannot apply to a case like the present where infants who are entitled at the present moment to legacies to the amount of £35,000 (which have not yet been set apart because there have been no funds apparently out of which they could properly be set apart), who take seven-elevenths, as matters at present stand, of the residuary estate in remainder subject to the lives of at least four persons, come and ask for the protection which this Court has always given to infants, in order that they may know hereafter what the property was which was given for their benefit, may know that that property has been properly protected, may know when they come into possession what their shares are and what they ought to receive. And I put it to Mr. *Romer* whether I should not be running the risk of doing that which would be very mischievous if I were to say to every next friend who took out an originating summons on behalf of infants for the administration of an estate, unless you can satisfy me before I direct an administration that there is something wrong with regard to the conduct of the parties who have the management of this estate, I not only will make no order, but I will dismiss your application with costs? It seems to me that if I were to make an order of that kind, I should practically be refusing to infants that protection which this Court has always, if I may so say, almost gone out of its way to give them; and the mischief that I should produce by an order of that kind seems to me so beyond my calculation, and likely to be so serious, that

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unless I am told by the Court of Appeal that I ought, as a preliminary matter to making an order of this kind where infants are interested, to satisfy myself in some way (and I do not know how to do it) that the estate requires administration, I shall consider that I have the power to make an order for administration.

No doubt I have that power which, as it seems to me, will sufficiently protect the parties to this suit, because it is no longer obligatory upon me to pronounce a common administration decree. I may direct such inquiries as it seems to me are necessary for the protection of the infants, and when those inquiries are answered, I have it in my power to direct a stay of all further proceedings, and it seems to me that that is what I ought to do upon the present occasion. It is said that the accounts have been rendered with such fullness and completeness that anybody can understand them, that all the tenants for life are acquainted with them, and are satisfied with them, and that their satisfaction is a guarantee that the infants' interest has also been duly protected. In the first place, it is denied on the other side that the accounts are correct; I know not whether they are correct or not, but, at all events, it is stated that there is a question as to their correctness, and it is impossible for the Court to go through all the accounts and to have them all vouched in such a way as to satisfy itself that no question can be raised upon them which would be for the benefit of the infants. In the next place, I am not aware that the satisfaction of the tenants for life with the accounts is any guarantee to this Court that if the accounts were differently taken the infants might not find that they were benefited by alterations in the accounts; and I say that, distinctly believing that these accounts have been most carefully kept, and that the trustees believe that all the items in the accounts are accurate, and may be absolutely relied upon. Nevertheless, if there be any question which is more difficult than another for accountants, for other professional persons, or for the Court itself to decide, it is that of the appropriation which has to be made between income and capital. And I cannot help saying here that it is quite possible, that very serious questions, and not improbable that very difficult questions may arise as to what is capital and what is income in this case. I think, therefore, that I am bound—inasmuch as the

Plaintiffs are infants who cannot examine these accounts for themselves—not to refuse them the protection which they ask for. But in so doing, I shall take care as far as I can, and I hope counsel for the trustees will assist me in so doing, to grant no inquiries except such as will be absolutely necessary to determine whether anything which has been done ought to be undone, and whether or not the infant's interest in this property is rightly and carefully guarded.

I propose, therefore, in the first instance to grant this declaration, because I think it necessary for the protection of the infants: "To declare that the trusts of the post-nuptial settlement, and the trusts of the will and codicil, ought to be executed under the decree of this Court."

As to the debts and liabilities of the testator, I understand that matter to have been really disposed of, and I shall direct no inquiry with regard to them.

The first inquiry, I propose, should run in these terms: "An inquiry of what particulars the property subject to the trusts of the above-mentioned indenture of settlement and to the trusts of the testator's will and codicil respectively, consisted at the death of the testator, and of what particulars such properties respectively now consist."

The next inquiry I shall direct is this: "An inquiry whether any and what receipts and expenses respectively that were properly attributable to capital have been attributed to income." I leave out all about the trustees.

The next is this: "An inquiry what has been the income of the trust property under the will and codicils of the testator in each year since the testator's death, distinguishing the income of such parts of the testator's property as have been from time to time in a proper state of investment in accordance with the directions in the said will and codicils, and such as have not been so invested." That I think will bring out any questions that may have to be raised about the £6000 a year.

Solicitors for Plaintiffs and one Trustee: *Surr, Gribble & Co.*
Solicitors for the other three Trustees: *Henry Kimber & Co.*

D. P.

PEARSON, J.

1885

Jan. 29;
Feb. 2, 16.

In re SUTTON.
STONE *v.* ATTORNEY-GENERAL.

[1884 S. 2588.]

Will—Construction—Gift to Charity—"Charitable and deserving objects"—"Money."

A testatrix by her will desired "that the whole of the money over which I have a disposing power be given in charitable and deserving objects, the amount being six hundred pounds sterling":—

Held, that this was a good charitable gift.

Williams v. *Kershaw* (1) distinguished.

At the date of the will in August, 1881, the testatrix had over £600 at her bankers. In February, 1883, she invested £600 in the purchase of £586 Consols. At the date of her death in May, 1884, she had the £586 Consols, £555 at her bankers, and £8 cash in her house:—

Held, that the word "money" in the will ought not to be extended beyond its strict meaning.

MARY SUTTON made her will dated the 20th of August, 1881, in the following terms:—"I desire that the whole of the money over which I have a disposing power be given in charitable and deserving objects, the amount being £600, six hundred pounds sterling. I appoint *John Stone* and *Christopher Atkinson* as my executors, and I desire that they shall each receive the sum of £50 for their trouble in distributing the same. Lastly, I revoke all former wills." The testatrix died on the 20th of May, 1884. An originating summons was taken out by the executors to determine the construction of the will.

Byrne, for the executors.

Stirling, for the Attorney-General:—

There is a good charitable gift; the objects are to be both charitable and deserving.

Warmington, Q.C., and *Stokes*, for the next of kin of the testatrix:—

The word "and" should be read "or," and the objects may be

(1) 5 Cl. & F. 111, n.

either "deserving or charitable." This is too indefinite to constitute a good charitable gift: *Williams* v. *Kershaw* (1); *Whicker* v. *Hume* (2); *Morice* v. *Bishop of Durham* (3).

Stirling, in reply.

PEARSON, J. (after reading the will):—

The question is, whether there is a good gift for charitable purposes, and it is really a question of English; the law is not in dispute. It is admitted that if the words were "be given in charitable objects," the bequest would be good, and, on the other hand, that if the words were "be given in deserving objects" the bequest would be bad. The question is whether, the words being "be given in charitable and deserving objects," the bequest is good, and it depends upon whether "charitable and deserving" is intended to describe one class of objects or two. It has been argued with much force by Mr. *Warmington* that, inasmuch as the copulative "and" is used, the proper construction of the clause is that it refers to charitable objects and to deserving objects. Is that the right construction? There can be no doubt as to the rule, that you ought so to construe a clause as to lean neither to the one side nor to the other; that you ought to give it its proper grammatical construction, not straining it in one direction in order to give more to charity, and not straining it in the other direction in order to give less to charity.

To my mind the words "charitable and deserving objects" mean only one class of objects, and the word "charitable" governs the whole sentence. It means objects which are at once charitable and deserving. If you were to treat the word "deserving" as standing alone it would be so vague that I do not know what meaning could be attached to it. Almost any object might be said to be a "deserving" object. But, to my mind, the testatrix has coupled the two words together. The objects of her bounty were "charitable" objects, and, as there are a great number of charitable objects, she draws the line a little closer by adding the

(1) 5 Cl. & F. 111, n. (2) 1 D. M. & G. 506.
(3) 10 Ves. 522.

PEARSON, J. 1885 *In re* SUTTON. STONE *v.* ATTORNEY-GENERAL.

words "and deserving." It is suggested that you can never use a second adjective, coupled with the first by the conjunction "and," so as in any way to restrict the meaning of the first. I will give an instance in which you can do this,—instead of giving "to young persons under twenty-one," you might add the words "and unmarried," and those words would undoubtedly restrict the meaning of the former words. They would leave the word "young" in full force, but they would add the condition that the persons must have neither husband nor wife.

One of the cases principally relied upon by Mr. *Warmington* was *Williams* v. *Kershaw* (1), which was decided by the then Master of the Rolls (I believe Lord *Cottenham*). There the gift was in these words, "I direct my said trustees from time to time to apply the residue of the said dividends, interest, and annual produce to and for such benevolent, charitable, and religious purposes, as they in their discretion shall think most advantageous and beneficial," and the Master of the Rolls said (2), "It was argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would, no doubt, be benevolent, and, in a legal sense, charitable; but the question is, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund except to religious purposes? Such does not appear to me to be his intention; he intended to restrain the discretion of the trustees only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is, what the decisions have ascertained to be the rule on this subject?" Undoubtedly, if I am obliged to say that the proper construction of the present gift is "in charitable or deserving objects" the case would fall entirely within the reasoning of the Master of the Rolls in *Williams* v. *Kershaw*, and I should be compelled to hold that the gift was bad. But, to my mind, there is an entire difference between a gift to the three purposes, "benevolent, charitable, and religious," without any conjunction, copulative or disjunctive, between the first two adjectives, as in *Williams* v. *Kershaw*, and the gift in the

(1) 5 Cl. & F. 111, n. (2) 5 Cl. & F. 113.

present case to "charitable and deserving objects." I agree with the Master of the Rolls that "benevolent, charitable, and religious" means that the gift may be applied in any one of those three ways. But when, as in the present case, the copulative conjunction connects the words "charitable" and "deserving," to my mind it changes the grammatical meaning altogether. The objects are to be at once charitable and deserving, and the testatrix shews that the class of objects which she wished to be chosen was to include those which should be both charitable and deserving, and in that way the gift will be good.

In *Morice* v. *Bishop of Durham* (1) no doubt Sir *Samuel Romilly* is reported to have said in his argument (2) that "it is a new rule of criticism, that a subsequent word, of more extensive signification, shall not enlarge a preceding, more limited, word, but that the sense of the latter shall be confined by the former." I do not agree entirely with Sir *Samuel Romilly*. It depends entirely on what the sentence is. The latter word may qualify the former, leaving the former to shew the general class of objects which are to be selected, and it may well be that, out of that general class, the testatrix has a particular class in her mind.

I do not think there is anything in the observations of the Lord Chancellor in *Morice* v. *Bishop of Durham* which at all conflicts with what I have said, and, giving the best grammatical construction I can to this will, I think the testatrix has said that the objects of her bounty are to be charitable, but that they are at the same time to be deserving. No one can doubt that there are a great many objects which might be said to be charitable which nevertheless, in the view of a person of common sense, would not be deserving.

I must, therefore, hold that the gift is a good charitable gift.

Byrne, for the executors:—

The next question is whether the word "money" in the will includes anything but money in its strictest sense—whether it includes the Consols.

(1) 10 Ves. 522. (2) 10 Ves. 528.

PEARSON, J.

1885

In re SUTTON. STONE v. ATTORNEY-GENERAL.

Stirling, for the Attorney-General :—

No doubt *primâ facie* "money" only includes cash, but it may include more. The question is one of intention, and if, as here, the testatrix has shewn an intention to dispose of all her property, it will be held to include all her property: *In re Cadogan* (1); *Prichard* v. *Prichard* (2); *Lowe* v. *Thomas* (3).

Warmington, Q.C., and *Stokes*, for the next of kin :—

It is clear that the word "money" is used strictly. A legacy of £50 is given to each of the executors "for their trouble in distributing," not the estate, but the legacy to charitable purposes. In other words £100 is given out of the general personal estate to the executors.

PEARSON, J. :—

I should like to know what was the property of the testatrix at the date of her will.

Feb. 16. An affidavit made by the executors was produced, which stated that they had ascertained that on the 20th of August, 1881 (the date of the will), the testatrix was entitled to a sum of £617 4*s.* standing to her credit at her bankers. Of this sum £17 13*s.* 4*d.* was credited in her account on the date of the 19th of August, 1881, and it was possible that, as she was then away from home, she might not, when she signed her will on the 20th of August, have been aware that that sum had been paid to her credit. Apart from that balance at her bankers, the executors believed that on the 20th of August, 1881, the testatrix was not entitled to any property whatever, except a life interest in a share of the estate of her late brother, and a balance of £55 in the hands of her solicitors. In February, 1883, she invested the sum of £600 in the purchase of £586 15*s.* 7*d.* consols, which sum she retained until her death, and at the date of her death there was a balance of £555 standing to her credit at her bankers, and £8 cash in her house.

(1) 25 Ch. D. 154. (2) Law Rep. 11 Eq. 232.
(3) 5 D. M. & G. 315.

PEARSON, J.:— PEARSON, J.

If ever there was a case for confining the meaning of the word "money" to its strict meaning, this is that case.

1885

In re SUTTON.

STONE *v.* ATTORNEY-GENERAL.

Solicitors for Plaintiffs: *Le Brasseur & Oakley*, agents for *Stone, King & Co., Bath.*

Solicitors for Defendants: *Hare & Co.; Yarde & Loader*, agents for *Nicholson, Chester.*

W. L. C.

C. A.
1884
Nov. 6.

In re INTERNATIONAL MARINE HYDROPATHIC COMPANY.

Company—Winding-up—Rates—Business carried on by the Liquidator—Beneficial Occupation.

An hotel company was wound up under an order of the Court, and the liquidator was directed to sell the hotel, but with liberty to carry on the business till the sale, so as to sell it as a going concern. The liquidator accordingly carried on the business in the hotel, but made no profit by it. Shortly after the commencement of the winding-up a poor-rate was made, and the overseers claimed payment of the rate from the liquidator in respect of his occupation of the hotel:—

Held (affirming the decree of the Vice-Chancellor of the county palatine of *Lancaster*) that the rate must be paid in full.

In re West Hartlepool Iron Company (1), and *In re Watson, Kipling, & Co.* (2), distinguished.

THIS was an appeal from a decision of the Vice-Chancellor of the county palatine of *Lancaster*.

The International Marine Hydropathic Company, Limited, was established in September, 1882, for the purpose of carrying on a hotel for hydropathic patients and others.

On the 24th of February, 1883, a petition for winding-up was presented, on which an order was subsequently made.

On the 27th of February a provisional liquidator was appointed, who was afterwards made the official liquidator in the winding-up.

On the 7th of April in the same year the overseers of the *West Derby Union*, within which the company's hotel was situate, made a poor-rate for the year commencing on that day.

On the 22nd of May an order was made by the Court that the hotel should be sold by the liquidator; but it was provided that the liquidator should be at liberty to carry on the business in the hotel till the sale, with a view to its being sold as a going concern.

Under this notice the official liquidator carried on the business; but according to the evidence no profit was realised. Under these circumstances the overseers claimed £76 10*s.* for rates from

(1) 34 L. T. (N.S.) 568. (2) 23 Ch. D. 500.

the official liquidator, and applied for leave to levy that sum on the premises.

The Vice-Chancellor, Mr. *H. F. Bristowe*, made an order that the overseers should be at liberty to levy the rate, and from this order the official liquidator appealed.

T. W. Chitty, for the Appellant:—

There has been no beneficial occupation of the property, therefore no rate is due, the hotel is merely kept open in order that it might be sold as a going concern, and no profit has been made by it; on the contrary, the business has been carried on at a loss: *In re West Hartlepool Iron Company* (1) and *In re Watson, Kipling, & Co.* (2) are authorities that where there has been no beneficial occupation by the official liquidator, he is not liable to pay the rates in full; but the overseers or the local authority must prove against the company for what money is due.

Ralph Neville, for the overseers, was not called on.

BAGGALLAY, L.J.:—

This is an application by way of appeal against an order of the Vice-Chancellor of the county palatine, by which order he authorized the overseers of the parish to distrain for the sum of £76 10*s.*, the amount of the poor-rate on the property of the company, which was in liquidation, in the event of that £76 10*s.* not being paid.

The company, which was for the purpose of carrying on an hotel, or hydropathic establishment in the nature of an hotel, was formed in the month of September, 1882. It seems very soon to have got into trouble. On the 24th of February, 1883, there was a petition for winding-up, and on the 27th a provisional liquidator was appointed, who afterwards became the official liquidator. On the 7th of April the rate was made. Early in May, having regard to the value of the business of the company which was in liquidation, the Court made an order that the liquidator should be allowed to carry on the business with a view to its sale as a going concern; the business was accordingly carried on and

(1) 34 L. T. (N.S.) 568. (2) 23 Ch. D. 500.

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the poor-rate was made on the property upon which the business was so carried on with a view to making a profit. Whether it resulted in making a profit would be immaterial; the object was to make an advantageous sale of the property, and it was carried on to save a loss in selling it. Leave was given by the Vice-Chancellor to the overseers to distrain for the rate if the rate was not paid, and I should have thought it was a case free from all question whatever. The business was being carried on under the direction of the Court, and continued as a going concern with a view to its being sold as a going concern.

But we have been referred by Mr. *Chitty* to two cases which he thinks should lead us to a different conclusion upon the point. The first was a case decided as long ago as 1876 by Vice-Chancellor *Bacon*, *In re West Hartlepool Iron Company* (1). But the distinction in that case is this, that there the rate was made before the commencement of the winding-up, and that at the time of the company going into liquidation there was no carrying on of the works. A very large proportion of the workmen had been discharged three weeks or a month before the winding-up order. A few only were kept on until such time as the furnaces could be blown out, and that was completed I think on the 7th of July, 1875, very shortly before the winding-up order, which was made on the 10th of July. No doubt in that case the Vice-Chancellor said that common sense led him to refuse authority to the overseers to distrain. I think there were good reasons for not enforcing payment of the rate; but the Vice-Chancellor said that even in that case he hoped it would be taken elsewhere. But no appeal was brought from this decision. The Vice-Chancellor decided on this ground, that the possession of the liquidator was merely possession and occupation, and not enjoyment. It was not the occupation intended by the Act. The argument that Mr. *Buckley* addressed to the Court in that case was, that the rate was a rate due and demandable at the time it was made, and might have been levied by distress. It was, therefore, a debt provable in the winding-up, that is, in respect of the liability incurred before. Mr. *Rigby* on the other side argued that as the rate was a debt which was recoverable by distress, it must be

(1) 34 L. T. (N.S). 568.

regarded as a charge on the property. That we do not dissent from, and it appears to me that the case was decided upon the ground of beneficial occupation. But the facts in that case were materially different from those which we are at present considering.

The other case to which Mr. *Chitty* refers is the case of *In re Watson, Kipling, & Co.* (1). In that case the head-note is this: "Where the occupation by the liquidator of the property of a company in liquidation had not been beneficial, an application for payment in full of poor-rates and local board of health rates made after the liquidation commenced was refused." I apprehend that if there had been a beneficial occupation of that property by the liquidator at the time when the rate was made, the Court would have taken a different view, having regard to the ground upon which the order was made, namely, that there was at that time no beneficial occupation. The rates were not made for several months, and some of them for more than a twelvemonth after the commencement of the winding-up, and the conclusion at which the learned Judge arrived, rightly or wrongly, was this, that there was no beneficial occupation at the time when the rate was made, and that was the ground of the decision. It appears to me that it was rightly decided, and that it was the conclusion, using the expression which was used by the Vice-Chancellor in the former case, "that common sense" required should be arrived at.

BOWEN, L.J.:—

I am entirely of the same opinion.

FRY, L.J.:—

I am also of the same opinion. The rule has been laid down in the Court of Appeal in the case of *In re Oak Pits Colliery Company* (2), and that rule I take to be this:—If the debt or liability is incurred by the liquidator or by the company after the winding-up, in the course of carrying on the business of the company, it must be paid in full. Such debts and liabilities are

(1) 23 Ch. D. 500. (2) 21 Ch. D. 322.

C. A. 1884 *In re* INTERNATIONAL MARINE HYDROPATHIC COMPANY.

not debts and liabilities of the company in liquidation. They are debts and liabilities incurred subsequently to the liquidation, and it seems monstrous that the company should be allowed to carry on its business for its own purposes without paying the debts which have been incurred by so carrying it on.

Solicitors: *Pritchard, Englefield & Co.; Cleaver, Holden & Co., Liverpool.*

M. W.

C. A. 1885 *Feb.* 2.

In re NATIONAL ARMS AND AMMUNITION COMPANY.

Company—Winding-up—Rates—Business Premises, Occupation of, by Liquidator—Beneficial Occupation.

A company was being wound up under supervision, the liquidation commencing in 1882. The liquidator did not keep the concern in full work, but remained in occupation of the business premises for the purpose of carrying out some pending contracts, finishing a quantity of unfinished articles, and storing and keeping in order a quantity of completed articles with a view to selling them. In March, 1883, a rating authority made a rate for 1883 on all the property within the district. The liquidator allowed the time for appealing against the assessment to go by. The rating authority applied to the Court for payment of the rate in full:—

Held, that as the liquidator had from the commencement of the winding-up occupied the property for the purposes of the company, and with a view to acquiring gain or avoiding loss to the company, the rate ought to be paid in full.

Whether, in order to entitle the rating authority to be paid in full, it is necessary for the liquidator to have any more beneficial occupation of the property than is required under the ordinary law as to rating, *quære*. The test in *In re West Hartlepool Iron Company* (1) doubted.

Where the liquidator, being in possession, does not appeal against the assessment, the Court will not refuse to order payment of the rate in full on the ground of its being too high, except perhaps in extreme cases.

ON the 16th of December, 1882, the company passed a resolution for voluntary winding-up, and on the 20th of December, 1882, an order was made for continuing the winding-up under supervision.

The company had almost ceased to carry on business for some

(1) 34 L. T. (N.S.) 568.

months before the winding-up, and the liquidators did not put the concern into full work, but they completed a quantity of unfinished articles which could not have been sold in their unfinished state except at a heavy loss, completed several contracts for the supply of arms which were pending at the commencement of the liquidation, and stored upon the business premises, and kept in order, a quantity of manufactured articles, with a view to selling them as an opportunity occurred.

The company were on the rate-book for *Birmingham* as occupiers of the business premises.

On the 6th of March, 1883, the corporation of *Birmingham*, under the powers of their local Acts, made a borough improvement rate of 2*s.* in the pound, and a street improvement rate of 1*d.* in the pound, on all the rateable property within the borough for the year 1883.

The premises were rated at £1200, so that the amount payable in respect of the borough improvement rate was £120, and in respect of the street improvement rate £5, making together £125.

No steps had been taken by the liquidator to alter the assessment of the rateable value of the business premises, and the time for doing so had expired.

The liquidators having refused to pay the rates, the corporation took out a summons asking that the liquidators might be ordered to pay the rates in full, or that the applicants might be at liberty to distrain.

One of the liquidators deposed that a small part only of the premises was used for the purposes of finishing the unfinished goods, and that the labour expended thereon did not amount to one-twentieth part of the productive capacity of the works, and that since the winding-up the business of the company had never, in fact, been carried on as a going concern:—"That although the said articles were sold at a price exceeding the cost of manufacture, the whole business of the company was not thereby or ever carried on profitably by the liquidators, and the occupation of the said property has not, by reason of the performance of such work, been otherwise beneficial to the company. That there has been, in fact, no beneficial occupation of the said property by the

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liquidators. That the assessments of the said rates are, under the circumstances, excessive and inequitable."

The summons was heard before Mr. Justice *Chitty* in Chambers, and his Lordship, considering himself bound by the decision in *In re Watson, Kipling, & Co.* (1), dismissed the application with costs, and gave a certificate that the case might be brought direct to the Court of Appeal.

The appeal was heard on the 2nd of February, 1885.

Romer, Q.C., and *W. P. Beale*, for the corporation, in support of the appeal:—

If a company which is in course of liquidation incurs debts for the purposes of the liquidation, they must be paid in full. So if a company in liquidation retains possession of premises for the purposes of the liquidation, and with a view to making profit or avoiding loss, it must pay rent and rates like any other occupier. Mr. Justice *Chitty* considered himself bound by *In re Watson, Kipling, & Co.*, but that decision turns on the question of fact whether there was a beneficial occupation, and Mr. Justice *Kay* found that there was not. Here the occupation, partly for business purposes and partly for warehousing, must be considered a beneficial occupation. [They were then stopped by the Court.]

Finlay, Q.C., and *Grey*, *contrà*:—

There are two questions: (1.) Was there a beneficial occupation; (2.) Was the assessment right, having regard to the nature of the occupation.

There are two classes of claims,—that of the landlord for rent, and that of the rating authority for rates. After the decision in *In re Lundy Granite Company* (2), it is impossible to dispute that if the liquidator occupies property for the purposes of the winding-up the rent must be paid in full; but the case of rates is different—the right to rent resulting from a contract, the liability to rates being only a statutory burden. But supposing the rate otherwise payable, we say that, having regard to the nature of the occupation, it is excessive: *Staley* v. *Overseers of Castleton* (3); *Harter* v. *Overseers of Salford* (4).

(1) 23 Ch. D. 500.
(2) Law Rep. 6 Ch. 462.
(3) 5 B. & S. 505.
(4) 6 B. & S. 591.

[FRY, L.J.:—You have not appealed to the proper quarter. Are we to be turned into an assessment committee?]

If the assessment is clearly excessive, the Court, in the exercise of its discretion, will refuse to order payment: *In re Watson, Kipling, & Co.* (1). We do not ask the Court to assess the value now, but to refuse the present application and leave the corporation to apply again when they have obtained a fair assessment.

[BAGGALLAY, L.J.:—Your case seems to stand no higher than this, that if you had appealed to the proper quarter you would probably have got a reduction.]

BAGGALLAY, L.J.:—

This company went into voluntary liquidation on the 16th of December, 1882, and on the 20th an order was made for continuing the winding-up under the supervision of the Court. On the 6th of March, 1883, the corporation of *Birmingham* made a borough improvement rate of 2*s.* in the pound, and a street improvement rate of 1*d.* in the pound on all the rateable property within their jurisdiction. The amount of the rate in respect of the premises occupied by the company was £125; being £120 for the borough improvement rate, and £5 for the street improvement rate. These rates were for the year beginning on the 1st of January, 1883, and ending on the 31st of December, 1883. The corporation applied by summons for a direction that the company should pay the rates. The decisions have varied as to payment of rent or rates by the liquidator owing to the difficulty of working together sects. 87 and 163 of the *Companies Act*, 1862. Taking them together they appear to come to this, that sect. 163 standing alone would make any distress against the property of the company pending the winding-up absolutely void, but that under sect. 87 the Court has power to allow the distress to be levied in proper cases. The same principles must guide the discretion of the Court, whether the application is in the shape of an application for leave to distrain, or of an application for payment.

It is said that this is one of the first applications of the kind that have been brought before us, but we are not wholly without

(1) 23 Ch. D. 500.

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authorities to guide us. The effect of the decision in *In re Lundy Granite Company* (1) is that if a company in course of being wound up remains by its liquidator in possession of leasehold property, for its own purposes and with a view to the realisation of its property to better advantage, the Court will aid the landlord in obtaining the payment in full of the rent accrued due after the commencement of the liquidation. The principle on which that case was decided applies equally to other outgoings connected with property the possession of which is retained for the purpose of more advantageously winding up the affairs of the company. In the case of *In re Oak Pits Colliery Company* (2), Lord Justice *Lindley*, in delivering the judgment of the Court, says: "When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used, ought to be paid in full without reference to the amount which could be realised by a distress." It would not require much to lead me to the conclusion that by parity of reasoning a rate which is levied upon property while retained by the liquidator with a view to the more advantageous realization of the company's property, or used by him for profitable purposes, must be paid in full. His Lordship proceeds: "But no authority has yet gone the length of deciding that a landlord is entitled to distrain for, or to be paid in full, rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee." If there had been no further authority on the subject I should have thought that there was here a retention of the property with a view to more advantageous winding up, and that rent ought to be paid in full.

There are three cases on the subject of rates. The first is *In re West Hartlepool Iron Company* (3), decided by Vice-Chancellor

(1) Law Rep. 6 Ch. 462. (2) 21 Ch. D. 322, 330.
(3) 34 L. T. (N.S.) 568.

Bacon in 1876. In that case a rate had been made before the commencement of the winding-up, and the business was not going on. The Vice-Chancellor held that the payment of the rate in full ought not to be ordered, on the ground that there had been merely possession and occupation but not enjoyment. The next is *In re Watson, Kipling, & Co.* (1). Mr. Justice *Kay* there entered very fully into the case, and pointed out that it did not follow, because the property was liable to rates, that the Court would give leave to distrain for them or order them to be paid in full, and his Lordship, rightly or wrongly, came to the conclusion of fact that there had been no beneficial occupation. On that ground he refused an application for payment in full. The third case is *In re International Marine Hydropathic Company*, heard here in November last (2), where the official liquidator appealed from an order directing him to pay rates. The authorities were then considered, and the Court came to the conclusion on the facts that the case did not come within the grounds on which *In re West Hartlepool Iron Company* (3) and *In re Watson, Kipling, & Co.* were decided, and that the rates must be paid.

The facts of the present case are these. The company was formed for the manufacture of arms. It was stated in the opening of the case, and was not contradicted, that the liquidator had retained possession of the whole of the premises. For what was it retained? Was it not for the more profitable liquidation of the affairs of the company? At the commencement of the liquidation the company had contracts on hand which it was considered desirable to complete, and they were completed. It had in stock a number of unfinished rifles; they were finished and sold at a profit. It appears to me impossible to hold that under these circumstances there has not been a beneficial enjoyment in this sense—that the occupation by the company has been continued with a view to the more advantageous realization of its assets. I am therefore of opinion that the appeal must succeed.

BOWEN, L.J.:—

I am of the same opinion. A broad line is to be drawn between obligations which have accrued before the commencement of the

(1) 23 Ch. D. 500. (2) *Ante*, p. 470. (3) 34 L. T. (N.S.) 568.

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winding-up and those which accrue after the commencement of the winding-up. Persons having claims which have accrued due before the winding-up must come in as creditors *pari passu*. But on principle there is no reason why a debt properly incurred by the liquidator after the commencement of the winding-up should not be paid in full, nor can I see why sums becoming due after the commencement of the winding-up, in respect of property of which the liquidator retains possession for the purposes of the company, should not be paid. It does not appear to me that we ought to enter into particular inquiries—what is the nature of the occupation, or whether it has been in the result profitable. The precise nature of the occupation is no doubt under the ordinary law of rating material as regards the amount to be assessed on the property; but it does not seem to me that it ought to be held material in any other way. If the company retains the possession of property which would be rateable in the hands of anyone else, it is only reasonable that it should be rateable in the hands of the company. If the retaining the possession of property after the commencement of the winding-up makes the company liable for the rent, why should not rates be paid in respect of property the possession of which is retained for the benefit of the company? If the liquidator is bound to discharge the claims of the landlord, why should he not be liable to pay the rates imposed by statute?

But assuming that it is requisite to shew something more of enjoyment than is required by the ordinary law as to rating, something such as is referred to by Vice-Chancellor *Bacon* in *In re West Hartlepool Iron Company* (1), it was distinctly laid down in *In re International Marine Hydropathic Company* (2) that the avoiding of loss is the acquisition of gain. It is, therefore, not necessary to shew that the possession of the premises has been a source of actual gain to the company, and I think that here there has been enjoyment, even within the rule laid down by Vice-Chancellor *Bacon*. As regards the amount of the rate, I think we must assume that the property has been properly rated. It has been urged that it evidently is rated too high, and that we ought to decline to enforce an unjust rate. If a clear case of

(1) 34 L. T. (N.S.) 568. (2) *Ante*, p. 470.

exorbitant rating were established, I should be sorry to fetter the hands of the Court by saying that, because the liquidator has not appealed against it, we are bound to enforce the rate. But where no strong case of a manifestly unjust rate is established, it would in my opinion be *pessimi exempli* to interfere on the ground that the rate may be too high. We do not sit as assessment commissioners, and unless it appears that there has been a gross miscarriage of justice, a liquidator who has not appealed in the regular way against the assessment, cannot appeal to us. *In re Watson, Kipling, & Co.* (1) was decided upon the special facts of the case. Whether the decision was right or wrong is not material, it went on the ground that the possession had not been beneficial in the special sense to which I have alluded. In the present case we come to the conclusion that the occupation was beneficial.

FRY, L.J.:—

When a company is wound up, the creditors who are such at the commencement of the winding-up stand on an equal footing as between themselves. But if after that period the company or the liquidator on its behalf, in order to acquire gain or to avoid loss, enter into contracts or occupy land, they must do so on the same terms as any other subjects of Her Majesty, and neither the persons with whom the contracts are entered into, nor the persons to whom sums in respect of the land are payable, whether landlords or rating authorities, are bound to accept a dividend on their claims. I am of opinion, therefore, that the rates in question must be paid in full.

It is urged that the rates are excessive, and that the Court, therefore, ought not to order them to be paid in full. But there are well known means of reducing the assessment where a property has been assessed too high. The liquidator has neglected to adopt these means, and it does not lie in his mouth to say that an assessment against which he did not think fit to appeal is an improper one.

Some discussion took place as to the form of the order, and ultimately it was directed that the liquidator should have liberty

(1) 23 Ch. D. 500.

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to pay the rates in full, and that in default of his so doing the corporation should be at liberty to distrain.

Bowen, L.J.:—

I wish to add that I am not satisfied that the test given by Vice-Chancellor *Bacon* in the case of *In re West Hartlepool Iron Company* (1) is the true one. I am disposed to think that the true test is whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open, in case it should ever call for decision.

Fry, L.J.:—

I agree in the remarks of Lord Justice *Bowen*, and desire to keep that question open.

Solicitors for Appellants: *Sharpe, Parkers & Co.*
Solicitors for Liquidator: *Stibbard, Gibson & Co.*

H. C. J.

C. A. 1885 *Jan.* 12.

FARRER *v.* LACY, HARTLAND, & CO.

[1882 F. 2311.]

Practice—Security for Costs of Appeal.

There is no general rule that an insolvent appellant will be exempted from giving security for the costs of the appeal because the case involves a question of law which has not been previously considered by a Court of Error.

Rourke v. *White Moss Colliery Company* (2) explained.

On the 23rd of November, 1883, judgment was given in this action directing an account of what was due from the Defendant, *F. Day*, to the Plaintiff under a covenant contained in a mortgage deed, and for his costs, and ordering *Day*, within one month from the date of the certificate, to pay the amount to the Plaintiff. An account was also directed of what was due to the Plaintiff under

(1) 34 L. T. (N.S.) 568. (2) 1 C. P. D. 556.

the mortgage deed, and for costs of the action. A sale of the mortgaged property was also directed (1).

On the 14th of February, 1884, *Day* served notice of appeal from this judgment.

The mortgaged property was sold for £10,000 to the Plaintiff, who had obtained leave to bid. On the 2nd of December, 1884, the certificate of the Chief Clerk was filed, by which he found £10,555 6*s.* 10*d.* due to the Plaintiff for principal, interest, and costs, and certified that after deducting the purchase-money there remained due to him £555 6*s.* 10*d.*

On the 19th of December, 1884, *Day* moved to stay execution till the appeal was heard. Mr. Justice *North* made an order dismissing the motion with costs unless the £555 6*s.* 10*d.* was paid into Court within a week, in which case execution was to be stayed. *Day* appealed from this order, and the appeal was dismissed with costs on the following day.

On the 8th of January the Plaintiff gave notice of motion that *Day* might be ordered to give security to the amount of £50 to answer the costs of his appeal from the judgment. This was supported by an affidavit of a clerk of the Plaintiff's solicitors filed on the 10th of January, that on the 29th of December, 1884, execution was issued against the goods of *Day* for the £555 6*s.* 10*d.*, and placed in the hands of the sheriff on the 30th, "but nothing has been realized under the said execution, the officer stating that there are no goods of the Defendant available to levy on." The affidavit then stated the order of the 19th of December and the dismissal of the appeal on the 20th, and stated that *Day* had not paid the £555 6*s.* 10*d.*, or any part thereof, into Court, and that the whole of that sum remained due to the Plaintiff. The affidavit did not contain any express allegation that *Day* was unable to answer the costs of the appeal. *Day* filed no affidavit.

Barber, Q.C., and *F. Lewin*, for the application :—

Execution was postponed because it was hoped that the property would realize the amount claimed. It has not done so, execution therefore was taken out, and has realized nothing. It is clear that the Defendant is not able to answer costs.

(1) 25 Ch. D. 636.

C. A. 1885 FARRER v. LACY, HARTLAND, & Co.

Horton Smith, Q.C., and *Lock*, for the Defendant:—

There is no admissible evidence of the Defendant's insolvency, the only evidence that the execution realized nothing being hearsay. There is no affidavit of belief that the Defendant is unable to pay. Under Order LVIII., rule 15, special circumstances are required to authorize security for costs. Where an appeal raises a point of law which has never been decided by the Court of Appeal, security for costs will not be ordered: *Rourke* v. *White Moss Colliery Company* (1).

[BAGGALLAY, L.J.:—What is the point of law here?]

Whether a mortgagee selling under his power who takes a cheque for the deposit is answerable for the amount if the cheque is not honoured.

[BOWEN, L.J.:—The case to which you refer cannot be contended to decide any more than this, that a point of law raised by an appeal may be so important that the appeal ought to be allowed to go on, though security for costs is not given.]

The delay in this case is sufficient to bar the right to security if there were no other objection.

BAGGALLAY, L.J.:—

I am of opinion that security ought to be given. I wish to make a few remarks as to *Rourke* v. *White Moss Colliery Company*, which appears to have been misunderstood. The action there was of a very special nature. The plaintiff was a workman employed by a contractor who was executing a work for the company, and he was injured owing to the negligence of an engineer employed by the company, but acting under the orders of the contractor. The action was against the company, on the ground that it was answerable for the negligence of the engineer, who was its servant; the decision was adverse to the plaintiff on the ground that the plaintiff and the engineer were engaged in a common employment under the orders and control of the contractor. It was pressed on the Court of Appeal, of which I was at the time a member, and I well remember the case, that it would

(1) 1 C. P. D. 556.

be a denial of justice to the plaintiff, who had been reduced to poverty by the accident, if he could not appeal without giving security for costs. It was also urged in his favour that the point had never been before a Court of Error; but the decision went, not on that, but on the ground, that, having regard to the whole circumstances of the case, it would have been a denial of justice not to allow the plaintiff to appeal without giving security; it was not intended to lay down any such general rule as is now contended for. In the present case the evidence of insolvency is not very strong, but there is enough to call for an answer. An execution was put in, the affidavit filed on behalf of the Respondent states as a fact that it has produced nothing, and the deponent goes on to say that he was informed by the sheriff's officer that there were no assets. This raises an inference of the impecuniosity of the Appellant, and he makes no answer. If he has means to answer costs, nothing is easier for him than to shew that fact. The execution was stayed on the terms of the Appellant paying a sum of money into Court in a week, which he has not done, and this also tends to shew his want of means.

BOWEN, L.J.:—

I am of the same opinion. The Lord Justice *Baggallay* has expressed what appears to me to be the true view of *Rourke* v. *White Moss Colliery Company* (1). Suppose the plaintiff in that case had been right on the point of law, his insolvency would have arisen from the wrongful act complained of in the action. To have required security for costs on the ground of an insolvency which (if the plaintiff was right) the defendant had wrongly caused, might have been a denial of justice. The Court decided that case on its special circumstances, and not on any such rule as is now contended for.

FRY, L.J.:—

I concur.

Solicitors for Plaintiff: *Duncan, Warren, & Gardner.*
Solicitors for Defendant: *Pyke & Minchin.*

(1) 1 C. P. D. 556.

C. A.
1883
KAY, J.
July 26.
C. A.
1885
Jan. 17, 19.

GARD *v.* COMMISSIONERS OF SEWERS OF THE CITY OF LONDON.

[1883 G. 1614.]

Commissioners of Sewers—Power to take Land—57 Geo. 3, c. xxix.—Right of Pre-emption—14 & 15 Vict. c. xci., s. 54.

Two houses adjoining *Wood Street*, in the city of *London*, having been destroyed by fire, the outer walls only being left standing, the Commissioners of Sewers adjudicated that it was desirable to widen *Wood Street*, and that the two houses, and the land on which they stood, projected into and prevented them from widening the street, and that the possession and purchase of those houses was necessary for that purpose, and they directed their solicitor to treat for the purchase. Notice to treat was accordingly given for the whole of the houses. The owners brought their action for an injunction to restrain the Commissioners from proceeding on this notice. It was admitted by the Commissioners that they only meant to use a strip of 5½ feet in breadth for widening the street, and intended to sell the rest without giving the Plaintiffs any option of pre-emption:—

Held, by *Kay*, J., and by the Court of Appeal, that the Plaintiffs were entitled to an injunction, for that the adjudication was *ultrà vires*, the Commissioners having no power to adjudicate that the possession of the whole of a piece of land is necessary for the purpose of improvements when they only intend to use a small part of it for that purpose, though if they made such an adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned.

If part of a piece of land prevents an improvement, the Commissioners have power to take part compulsorily, their power of proceeding compulsorily not being limited to taking the whole.

Whether the Commissioners, if they only want a part of the site of an existing house for the purpose of an improvement, can adjudicate that the possession and purchase of the whole house are necessary, *quære*.

Thomas v. *Daw* (1) considered.

By *Kay*, J., *semble*, that the right of pre-emption given by 57 Geo. 3, c. xxix., s. 96, is not taken away by the *City of London Sewers Act*, 1851 (14 & 15 Vict. c. xci.), s. 54.

THE Plaintiffs were owners in fee of two houses, Nos. 44 and 45 *Wood Street*, in the city of *London*, occupying a square piece of ground fronting on one side to *Wood Street*, and on the adjoining side to *Addle Street*. They were let to Messrs. *Foster, Porter, & Co.* for a term of twenty-one years, from the 25th of December, 1873, at the yearly rent of £650, the lessees being bound to

(1) Law Rep. 2 Ch. 1.

rebuild in case of fire. In the latter part of 1882 these, and a number of other neighbouring buildings, were destroyed by fire. The greater part of the outer walls of Nos. 44 and 45 remained standing, but within there was only ground covered with a mass of *débris*.

The Commissioners of Sewers, acting under 57 Geo. 3, c. xxix., considered that it would be advisable to take advantage of this opportunity to widen *Wood Street* and *Addle Street*. On the 19th of December, 1882, they passed a resolution adopting a report of their Finance and Improvement Committee, that it would be desirable to widen those streets about five feet so far as the buildings adjoining them had been destroyed by fire. Notice of motion was given for the next meeting to rescind this resolution as regarded *Wood Street*, and to make the street thirty-two feet wide. At the next meeting this motion was withdrawn—a memorial from the inhabitants of *Cripplegate* recommending a further widening was referred to the committee—and the consideration of a motion that *Wood Street* (as far as the property destroyed by the fire had been pulled down) should be widened six feet in addition to the five feet authorized, on the 19th of December, 1882, was adjourned to the next meeting. The committee reported in favour of widening *Wood Street* five feet only, and on the 16th of January, 1883, the Commissioners adopted this report. On an amendment to the adjourned motion, it was referred to the committee to ascertain the cost of widening *Wood Street* by the additional six feet. At this meeting a letter was read from the solicitors of Messrs. *Foster, Porter, & Co.*, proposing (*inter alia*) that the Commissioners should purchase Nos. 44 and 45 *Wood Street*, and grant them a building lease of the site.

At a meeting on the 30th of January, 1883, the Commissioners passed the following resolution :—

"That for the improvement of *Wood Street* and *Addle Street*, in the city of *London*, and for the public advantage, and under and in pursuance of the powers vested in them by the statute 57 Geo. 3, c. xxix. (1), this Court do forthwith alter, widen, and extend the

(1) 57 Geo. 3, c. xxix. "An Act for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein."

Sect. 80. "That for the improvement

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said streets. And this Court do adjudge that the houses, buildings, and tenements known as Nos. 28, 29, 30, 31 and 32 *Addle Street*,

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of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the Commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides or ends of any streets or public places within any parochial or other district, into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel, or pave such new part or parts of any such streets or public places so altered, widened, extended, opened, or lengthened as aforesaid; and that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, shall be adjudged by the said Commissioners or trustees, or other persons as aforesaid, to project into, obstruct, or prevent them from so altering, turning, widening, extending, lengthening, continuing, or opening the said streets or public places within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said Commissioners or trustees or other persons as aforesaid, and they shall have full power and authority, to treat, contract, and agree, or to employ any person or persons to treat, contract, and agree, with the several owner or owners, occupier or occupiers of all such houses, walls, buildings, lands, and hereditaments, of whatever nature, tenure, kind, or quality, for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said Commissioners or trustees, or other persons as aforesaid, and the owner or owners, occupier or occupiers thereof, out of the money to arise and be raised and to be received by them, either by virtue of any local Act or Acts of Parliament relating to such parochial or other district, or of this Act, and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also such other lands, tenements, or hereditaments, or so much thereof as they the said Commissioners or trustees or other persons as aforesaid shall think proper, into the said streets or other public places, and all such new parts of such streets or public places; and the owners and occupiers of houses and buildings, messuages and other hereditaments therein and adjoining thereto, shall be subject and liable to all the rates, assessments, powers, provisions, orders, clauses and things to be made by virtue of or contained in any local Act or Acts of Parliament relating to such parochial or other district, or by virtue of or contained in this Act, in the same manner as the present streets and public places included in any such local Act or Acts, or within the jurisdiction of this Act, and the owners and occupiers of houses or buildings and messuages or other hereditaments therein and adjoining thereto."

Sect. 81 gave power to incapacitated

and the freehold of the premises at the corner of *Addle Street* and *Wood Street* (known as Nos. 44 and 45 *Wood Street*) and the land whereon the same stands, project into, obstruct, and prevent them from so altering, widening, and extending the said streets, and that the possession, occupation, and purchase of such houses, buildings, and tenements, and of the land whereon the same stand, will be necessary for that purpose, and that this Court do order their solicitor to treat, contract, and agree with the owner or owners, occupier or occupiers of the said houses, buildings, and tenements, and of the land whereon the same stand, for the purpose aforesaid in pursuance of the said Act."

On the 9th of February, 1883, the Commissioners served the Plaintiffs with a notice to treat for the purchase of the whole of 44 and 45 *Wood Street.*

On the 16th of March, 1883, the committee authorized their engineer to negotiate with Messrs. *Foster, Porter, & Co.* for a settlement of their claim on the basis of granting them a long lease of Nos. 44 and 45, when set back.

On the 1st of May, 1883, the Commissioners adopted a report of the committee that they could not recommend the additional widening of six feet.

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persons to sell. Sect. 82 provided for disputed compensation being determined by a jury—the reference throughout being to "houses, buildings, lands, tenements, or hereditaments," without any express reference to part of a property. Sect. 84 provided for the payment into Court of the money, if exceeding £200, to be paid "for any lands, buildings, tenements, or hereditaments, or for any other matter, right or interest, of what nature or kind soever," purchased under the powers of the Act, and belonging to persons under incapacity. Sect. 85 contained provisions applicable to the case of a sum exceeding £20, and not exceeding £200. Sect. 87 provided that on payment or deposit of the compensation, "the said lands, tenements, and hereditaments, in respect whereof the same shall have been so paid or deposited as aforesaid," should vest in the Commissioners. Sect. 96 authorized the Commissioners from time to time to sell and dispose of all or any of the freehold or leasehold estates, lands, houses, hereditaments, and premises, which should be conveyed to them in pursuance of the Act or otherwise, provided the said freehold or leasehold estates, &c., so purchased were first offered for sale to the respective person or persons of or from whom the premises respectively were purchased by the Commissioners. If such persons elected to purchase, the price, in case of difference, was to be ascertained by a jury.

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On the 2nd of July, 1883, the Plaintiffs commenced this action asking for an injunction to restrain the Commissioners from proceeding on their notice to treat, and also to restrain them selling or disposing of any part of the property until it had first been offered for sale to the Plaintiffs.

The Plaintiffs moved before Mr. Justice *Kay* for an injunction on the 26th of July, 1883. Their evidence was to the effect that the Commissioners did not intend to use more than 5½ feet for widening the streets.

Rigby, Q.C., and *Theobald*, for the Plaintiffs:—

The motion in this case is, in substance, that the Defendants may be restrained from proceeding upon a notice which they have given under the provisions of the statute 57 Geo. 3, c. xxix., to the Plaintiffs to treat for the purchase of two houses and the land whereon the same were erected mentioned in it. The Defendants have put in no evidence, but they have sent a copy of a resolution which they passed to the effect that in pursuance of their powers they adjudged that the houses projected, obstructed, and prevented them from widening the streets mentioned in it, and that the possession of such houses was necessary for that purpose, but the Plaintiffs' evidence, uncontradicted, shews that the Defendants require only about 5½ feet of the land for that purpose, that they do not intend to keep the whole of the site, but that they have entered into an arrangement, after taking a portion of it, to sell the remainder to other persons for building purposes. The question is whether, 5½ feet only being actually required by the Defendants for their purposes, it is necessary that they should take the whole of the site. It is not denied that *primâ facie* the Defendants may have had a right to give notice to take the houses on the site, because they have power under the statute (sect. 80) to take them if they should adjudge them necessary for widening the street, but though the statute entitled them to take what they like for widening the street, they cannot take and retain more than is necessary for that purpose. The case of *Galloway* v. *Corporation of London* (1) may be referred to, but the decision there has nothing to do with this case. There the

(1) Law Rep. 1 H. L. 34.

authority given was for a large improvement of a locality, but here the Defendants only want 5½ feet for the purpose of widening the streets, and they propose to take the whole of the Plaintiff's property, not for that, but for the purpose of selling the larger part of it to their lessees. A railway company cannot buy land to sell to somebody else: *Kemp* v. *South Eastern Railway Company* (1); and even in *Galloway* v. *Corporation of London*, where the lands were scheduled and there was no limitation, it was laid down (2) that persons authorized to make large improvements cannot exercise their powers for any collateral object. The cardinal point of difference between that and this case is that the Defendants are to take only the land necessary for their purpose. They cannot say that they are authorized to take the whole land. The Defendants have power to buy part of the houses. The statute points to two things: there must be a projection into or obstruction of the street which prevents the improvement; and there must be the possession, occupation, and purchase of that which is necessary for the purpose of the improvement. It is submitted that the purchase of the houses will not be necessary for that purpose—indeed the Defendants say they do not want them for that purpose—and that the Defendants cannot take more than 5½ feet, as they cannot adjudge, which they must be able to do, that the piece of land which they propose to take projects into their new line of streets. They must take what they want of the land—the houses being gone—for the purpose of widening the streets and no more, and they cannot take the whole of the land, use a portion and sell the rest at, it may be, an advantageous price. There must be a *bonâ fide* adjudication that the land is required because it projects into the streets. The Defendants have gone through the form of adjudging the land necessary, and then they say that they can do without the greater portion of it; and that is, using the word in its moral sense, a fraud upon the statute just as much as an encroachment upon a power is. The statute must be construed as it stands, and a general law as expressed in the 96th section has not repealed the 80th section: *Taylor* v. *Corporation of Oldham* (3). The statute is one for parochial management, and it was never con-

(1) Law Rep. 7 Ch. 364. (2) Law Rep. 1 H. L. 43–45.
(3) 4 Ch. D. 395.

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templated that the Defendants should go and buy a large piece of land and make elaborate improvements and then sell the land they do not want; but that they should *bonâ fide* take only what they want for their purpose. The Plaintiffs are entitled to the injunction which they ask for.

Hastings, Q.C., and *John Henderson*, for the Defendants:—

The 80th section of the statute 57 Geo. 3, c. xxix., confers upon the Commissioners a judicial discretion which, so long as they exercise it honestly, the Court will not interfere with. They have full liberty to adjudge what property shall be taken, and they have adjudged, which they are authorized to do, that the whole of the houses are necessary because a portion of them obstructed and interfered with the improvements to the streets. They have no power to take a part of the property; but they must take the whole unless the Plaintiffs desire that they should take only a part and an agreement be come to. So long as the adjudication is honest it is final. It would not be honest if the Defendants have no intention of widening the streets, but if they put their power in force for the purpose for which it was given it is a perfectly honest exercise of it, even although they should take more property than is necessary for widening the streets and have an intention to sell a portion of it. The principle in *Galloway* v. *Corporation of London* (1) applies to this case. There, no doubt, the lands were scheduled, but here the object of the statute (57 Geo. 3, c. xxix.) is to make just as great public improvements as it was under the Act in that case. When the Defendants have adjudged that a part of a house obstructs a street, and that for their purpose it is convenient to take the whole of it they have power to take it: *Thomas* v. *Daw* (2); and it was with some view of their being allowed to reimburse themselves that the 96th section was inserted in the Act, therefore they are entitled to sell the land on which the houses stood if they do not want the whole. The admission that only 5½ feet will be required for widening the streets and that they intended to sell the rest does not make the adjudication of the whole of the two houses dishonest. Having no power to take a portion of the property they

(1) Law Rep. 1 H. L. 34. (2) Law Rep. 2 Ch. 1.

were obliged to adjudge that the whole was necessary, and an adjudication which was made for the purpose for which the power was entrusted to them was not made bad because they have adjudged more than they now want for their purpose, and intend to sell the surplus. The adjudication directly it is made becomes a specific description of the property which they may take, and it is just as if the houses had been scheduled in the Act; and that is the meaning of the decision in *Thomas* v. *Daw* (1).

An honest or dishonest use of their power must be tested by the object for which it is exercised. Here it is to enlarge the streets, and they take the whole property and sell a part to pay the expenses of the improvements. The admission made does not shew that the Defendants have made an adjudication which sect. 80 does not warrant. The judicial power vested by the statute in the Defendants having been exercised in a *bonâ fide* manner, apart from all fraud, the Court has no authority to go behind their adjudication. The 96th section compelled the Defendants to offer the property for sale to the persons from whom it was purchased, and in this respect the case is different from *Galloway* v. *Corporation of London* (2), but that section is repealed by the 54th section of the *City of London Sewers Act*, 1851 (14 & 15 Vict. c. xci.), and now there is no right of pre-emption.

Rigby, in reply.

KAY, J., referred to the case of *Thorpe* v. *Adams* (3).

KAY, J:—

This question is by no means free from difficulty, but I think it better, at this time of the year, not to delay expressing the opinion which I have formed. The question arises under the statute 57 Geo. 3, c. xxix., which empowers the Commissioners of Sewers or the trustees or other persons having the control of the pavements of any parochial or other districts from time to time to alter and widen the streets, and for that purpose they

(1) Law Rep. 2 Ch. 1. (2) Law Rep. 1 H. L. 34.
(3) Law Rep. 6 C. P. 125–135.

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have power to take compulsorily houses and lands. In this case the Commissioners have admitted that at the time when they adjudicated what land was wanted they did not intend to use more than 5½ feet in width of the part which is next to the streets for the actual widening of them; and that they intended to sell the rest for the purpose of raising money. That being their intention, they adjudicated that the houses mentioned and the land whereon the same stood would be necessary for the purpose of widening the street. [His Lordship read the adjudication, and continued:—] Now it has been decided in the case of *Thomas* v. *Daw* (1) that the section under which the notice was given enables them to take either the whole or part of a house; and with that construction I respectfully say I entirely agree. I came to the same conclusion myself. Lord *Chelmsford*, after saying that in his opinion the section enables the Commissioners to take the whole or part of a house, said, at page 7 of the Report: "But although I have arrived at this conclusion, I think that in every case of an intended widening or altering a street, it is competent to the Commissioners to adjudge that the whole of a house or building obstructs or prevents this object." And his Lordship went on to say: "If this is honestly done, though erroneously, I think it cannot be questioned. The only consequence of the Commissioners taking more than they require for the street"—that is, supposing they have made an error, and erroneously taken more than they really wanted—"would be that, under the 96th section, they would have to sell it subject to a right of pre-emption in the person from whom the house or building was purchased. But whether they intend to take the whole, or only a part, it is essential as a preliminary step that the Commissioners should adjudge that the house, or the part required, prevents them from altering or widening the street." The language is very plain. They must adjudge either that part of the house prevents their widening the street or that the whole of the house prevents their doing so. His Lordship continued, "and that the possession of such house (and I add, 'or such part thereof') is necessary for that purpose."

I take Lord *Chelmsford's* meaning to be this: the Commissioners must adjudge that the whole of the house prevents their widening

(1) Law Rep. 2 Ch. 1.

the street, or that part of the house prevents their widening the street; and then they must adjudge that the whole of the house is necessary to be taken to widen the street, or that part of the house is necessary to be taken to widen the street. In form, in this case, there is a clear adjudication that the whole of the houses—they do not use the word "whole," but they say that the houses obstruct the streets, and that the houses are necessary to widen the streets. The form of the adjudication fulfils the obligation thrown upon them by the words of the Lord Chancellor.

The section is most ungrammatically drawn and not very easy to construe. [His Lordship read from the section shortly:—And that if any houses or any part thereof shall be adjudged by the said Commissioners to project into, obstruct, or prevent them from so widening the said streets, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments, will be necessary for that purpose.] What does that mean? "And that the possession," and so on, seems to me to refer to the word "adjudged." And I take it to mean, if the Commissioners shall adjudge that the possession, and so on, and that seems to have been the view which Lord *Chelmsford* took of the section. Now, reading it so, first, they are to adjudge that the house, or part of the house, projects into, obstructs, or prevents the widening of the street; and, secondly, they are to adjudge that the possession, occupation, and purchase of the house, or "part" of the house, and I think the word "part" should be read all through the section—will be necessary for the purpose. What purpose? It is "the altering, turning, widening," and so on, "of the streets." In this case it is "widening" the streets. Therefore, the two things to be adjudged are, that the house obstructs the widening of the streets, or that part of the house does, and that the purchase of the house or part of it is necessary to widen the streets. Does that mean that they must make a formal adjudication, following the exact words of the section, when they admit that they never have in fact come to the conclusion that it is necessary to purchase all the house for the physical purpose of widening the streets, or that the whole of the house prevents their widening the streets? Is that the meaning? or is it, that if in fact it is only part of the

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house which obstructs the widening, and is necessary for the physical widening of the streets, they must *bonâ fide* come to a judgment upon, and determine, that question. Can they, as they have stated here, say, "We came most clearly to the conclusion that we really only wanted 5½ feet of the houses for the physical widening of the streets, and that that only really obstructed our physically widening the streets; but although we had that plainly in our minds at that time, we were at liberty, under the section, to adjudge that the whole houses obstructed our widening, and that we might take the whole houses in order to widen the streets." Is that the true construction? I confess I should have great hesitation in coming to that conclusion.

The argument was put thus, and it deserves the greatest possible consideration: that the Commissioners are not a trading body; that they are not armed with this power for the purpose of making a profit; but that they are a body like the corporation of *London* in the case of *Galloway* v. *Corporation of London* (1), armed with powers for the purpose of making improvements in this great city; and that it is part of the scheme of the Act that they may take, in carrying it out at some time, more land than is actually wanted for the physical purpose of widening the streets, and therefore the Court will deal very liberally with them —will give a most wide interpretation to, and will not interfere with their powers—although it may appear that they are taking more land than will be wanted for the actual widening, and intending, all along, to sell the portion which they will not use for that purpose, and by the sale to raise money to enable them to carry out the purposes of the Act. Then I was referred to the 96th section of the Act, to shew that they have the power, subject to the right of pre-emption, of selling any land which they may have taken and which they really do not want for the purpose of widening the streets, and that the moneys which they obtain from such a sale may be used for the purposes of the Act, and it was urged that this is within the case of *Galloway* v. *Corporation of London.*

Now there is a very wide distinction between this and the case of *Galloway* v. *Corporation of London.* In that case the lands

(1) Law Rep. 1 H. L. 34.

which were to be taken were all put in a schedule to the Act; they were actually defined by boundaries and quantities, and the words of the Act were that they might take all those lands, which not only shewed the extent to which they were to go, but placed a limit within the four corners of the Act, upon the quantity of land which they were to take. There is nothing of that kind in this statute. It contains no schedule. There is no limit whatever upon the lands which are to be taken, save such as is comprised in the words which I have read, and that makes an enormous difference between the two cases. Suppose, for example, that the Commissioners were to desire to widen one of the main thoroughfares of *London*—the whole of *Fleet Street* or one of the great arteries of *London*, or so much as came within their jurisdiction—and to say "We will take lands on both sides of the street;" if the argument be right, they could adjudge that every house and every piece of vacant land on both sides of the street obstructed it, however wide these might be, and they might take the whole of every such house and piece of land. Suppose the street passed the *Bank of England*, they might, if they thought fit, take the whole of the bank, although they might only want two feet of it for the purpose of widening the street. Suppose there was a large frontage of land, a quarter of an acre, in the city of *London* vacant, with no building upon it, then although they might only want a yard of such frontage they might if they chose take the whole, according to the argument. That would be giving a very much greater power to the Commissioners having the control of pavements than was given in *Galloway* v. *Corporation of London* (1); and that is a distinction between the two cases which would make me hesitate very much indeed before I could hold that under the Acts such bodies as the Commissioners are entitled to such power as that.

But there is another distinction which, to my mind, is greater still, and that is, that in *Galloway* v. *Corporation of London* there were very large powers indeed for raising moneys for the purposes of the Act generally; and upon the consideration of the whole of the Act, the House of Lords came to the conclusion, as expressed by Lord *Cranworth* (2), after commenting upon sections

(1) Law Rep. 1 H. L. 34. (2) Law Rep. 1 H. L. 46.

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of the Act, thus: "The object of all this is plain. It was anticipated that the projected improvements would be likely so to add to the value of property in the neighbourhood, that by enabling those at whose cost the improvements had been made to appropriate to themselves, at their old value, the houses and lands adjoining the improvements, and then to sell them at their increased value, they might be able wholly or partially to reimburse themselves the outlay they had made." It has not been pointed out to me, nor do I find any intimation whatever on the face of the Act which I have to construe, that any such purpose as that was in the contemplation of the Legislature when it was passed.

Again, Lord *Cranworth* said(1), after reading the money clauses of the Act: "This shews plainly that the respondents were to have the power of selling and appropriating the whole of the said lands, *i.e.*, the lands authorized to be purchased and not actually made to form part of the new street; and the only question is, what lands are so authorized to be taken? Even independently of the model Act, I can discover no limit except that imposed by the book of reference, and by the consent of the owner in the case of land taken under the 9th section. The appellant contends that the true limit is to be discovered by ascertaining what lands are necessary for enabling suitable houses or buildings to be erected along the sides of the new street, with a reasonable depth behind. This seems to me an arbitrary and fanciful limitation, not justified by anything to be found in the Act, and to be altogether inconsistent with the book of reference, and the map or plan annexed to it." That is, the appellant said, at any rate the amount of land to be taken should be limited by seeing how much land on the sides of the widened street might be wanted for the purpose of building new houses with a suitable depth behind; but Lord *Cranworth* in effect said: The only limit he found was in the map or book of reference, which described by boundaries the land which they might take, and the Act said they might take all that. Therefore he was not able to impose that arbitrary limitation.

Turning again from the Act in that case to this, I observe that the land which the Commissioners may take is the land

(1) Law Rep. 1 H. L. 48.

which they adjudge will be necessary for the purpose; and confining my observations for the moment to the case of a house, Lord *Chelmsford* has decided in *Thomas* v. *Daw* (1) that they may take, under this section, the whole or part of a house, and that they are to adjudge whether the whole or part obstructs the street, and whether the whole or part is wanted for the purpose of widening the street. Reading that literally, what they were bound to do was to "adjudge." What does that mean? It means to form a judgment—to come really, after consideration, to a decided opinion and conclusion, whether the whole of the houses obstructed the streets or only part of them, and they tell me they came to the conclusion that only part of the houses obstructed the streets. Secondly, they were to come to a conclusion by way of judgment, whether the possession of the whole of the houses was wanted for the purpose of widening, or only a part; and they tell me that for the physical purpose of widening, they came to the conclusion that only part of the houses was wanted, and they tell me how much. Then, were they justified (I do not for a moment treat it as a case of honesty or dishonesty—that I consider to be quite out of the question) when they in fact adjudged that only part of the houses obstructed, and was wanted for the physical purpose of widening the streets, in making the adjudication in the form in which they made it? That is the point I have to decide, and I think they were not justified, and for the reason I have given. I am against the Defendants in this case, holding that the admissions which they have made shew that their formal adjudication was in the wrong form; that it ought to have been an adjudication that only $5\frac{1}{2}$ feet of the houses obstructed and prevented the widening of the streets, and that the possession and purchase of that only were necessary for the purposes of the Act.

I must not omit to say that the section I have been considering, and Lord *Chelmsford's* decision in *Thomas* v. *Daw*, are open to this observation, that there may be very often cases where, at the moment of the adjudication the Commissioners do not know exactly how much they will want, and therefore *bonâ fide* they cannot say whether they really will want the whole or only part of a house—whether they will want five feet of a piece of land,

(1) Law Rep. 2 Ch. 1.

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or five yards, and they may therefore adjudicate *bonâ fide* and rightly and within the meaning of the Act that so much is wanted, either the whole or part of a house. But to say that after they have come to the conclusion exactly what they will want, they can claim more, would I think be wrong. I do not think that the Act gives them the power, when they do know exactly how much they will want, of taking extra land for the mere purpose of selling it at a profit.

There remains the other point, upon which I also have very great difficulty in agreeing with the argument for the Defendants. The Act, in sect. 96, in effect provides that it shall be lawful for the Commissioners from time to time absolutely to sell all or any of the freehold houses which shall thereafter be conveyed to them in pursuance of the Act, provided the said freehold houses so purchased are first offered for sale to the person from whom the premises are purchased. It was said that this section has been repealed, and it was admitted that at the time when the Commissioners gave notice to the owner of these houses to treat for the purchase of them, they had come to an agreement with some other persons that they would sell to them the surplus part of the land. Most certainly, if the 96th section be in force, that was clearly against the right of pre-emption which the owner had; but it was said they had power to do it, because the section was not in force, and reference was made to the *City of London Sewers Act*, 1851, an Act to continue the *City of London Sewers Act*, 1848, and to alter and amend the provisions of it. By sect. 54 it is enacted, "That it shall be lawful for the Commissioners to sell and dispose, in such manner as they may think fit, to any person, and by indenture under the hands and seals of seven of the Commissioners, to grant and convey by way of absolute sale in fee simple" any land purchased to widen the streets and deemed unnecessary, and on payment of the money the principal clerk shall give a receipt which shall be a good discharge. It was said that this, which does not in any way refer to the 96th section, (nor does that statute in any part of it refer to this,) repeals the right of pre-emption given in the 96th section. There is a great deal to be said for that argument, because the section I have just read begins with the words, "It shall be lawful for the

Commissioners to sell to any person," and it may be said that is totally inconsistent with the proviso that the person from whom they bought should have a right of pre-emption. But was that the purpose of the section? I should be very slow to consider that a section, worded like the 54th section, repealed by implication a section of a previous Act giving a right of pre-emption like this without referring to that section, and without referring to the Act which contained that section, and without manifesting, on the face of it, the smallest intention of repealing and taking away from an owner such a right. What would be the consequence? If that be so, it makes the argument on the first point more extravagant, because then, if the Commissioners wanted to raise moneys, they might take the whole of a house, or a piece of land a little bit of which interfered with the widening of a street, and they would be under no obligation to give the right of pre-emption of such part as they did not use to the owner from whom they bought it. They might sell it to whom they liked. That would be most extravagant. Even upon the lesser view can they sell to anybody they like so much land as they in fact find they do not want to use? Suppose, in this case, they had *bonâ fide* intended to widen the streets some ten feet to begin with, and then found that five feet would do, and they had a strip of land between the streets and the piece of land off which they had taken that strip, some five feet wide, which they did not know what to do with, according to this contention they would not give the owner of the other piece of land the right of pre-emption, but might sell the five feet which might be in front of his windows, and offer that plot of land to a stranger. I cannot conceive it possible, without express enactment, that this can be the effect of the 54th section. But I think it is plain that it was not the effect, if we look at the 55th section, which enacts, "It shall be lawful for the Commissioners and they are hereby authorized, by writing under the hands and seals of seven of the Commissioners, to demise or lease such lands." It seems to me the main purpose of the two sections was to enable seven of the Commissioners to exercise the formality necessary to carry out the sale, or a lease; and though I agree it is very badly expressed, seeing that this is a possible and not an unreasonable

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construction of the meaning of the two sections, it seems to me to be one which the Court is bound to adopt, rather than come to the conclusion that an important right of pre-emption, such as was given by sect. 96, is by implication taken away by the later Act. I think I should come to the conclusion, although it is not necessary to do so, that the later Act did not take away the right of pre-emption, and on that ground the Plaintiffs would be entitled to some of the relief which is asked by the motion; but being of opinion in their favour on the former point, it will be right to grant the injunction in the fullest terms, to prevent any further proceedings for compulsorily taking the whole of the houses. The Plaintiffs must submit to any proceedings that may be necessary for the compulsory taking of the 5½ feet.

T. F. M.

The order was as follows:—

"Both parties by their counsel consenting that this matter shall be treated as a motion for judgment, and the Defendants by their counsel admitting that on the 30th of January, 1883, the date of the said adjudication of the Commissioners of Sewers, the Defendants did not intend to use more than 5½ feet in width next *Wood Street* and *Addle Street* of the houses Nos. 44 and 45, *Wood Street*, but that they intended to sell the rest of the said houses without allowing any right of pre-emption to the Plaintiffs," declare that the adjudication of the 30th of January, 1883, was wrong and *ultra vires*. Perpetual injunction to restrain the Defendants from proceeding on their notice to treat dated the 9th of February, 1883.

C. A. The Defendants appealed, and the appeal was heard on the 17th and 19th of January, 1885.

Hastings, Q.C., and *John Henderson*, for the Appellants:—

We contend that the 80th section confers on the Commissioners a statutory discretion with which so long as it is honestly exercised the Court will not interfere. The Commissioners have to adjudge that the house or part of it obstructs the proposed alteration, and that the possession of the house is necessary for the improvement, and if they so adjudge, their adjudication, if honestly made, is final. Sect. 80 speaks of part of the land or house projecting, but the language as to purchase refers throughout, to a purchase of the whole. If the parties agreed it may be

that the Commissioners could take a part; but the compulsory power we submit cannot be exercised as to a part. Sects. 82, 84, 85, 87, 90, all tend the same way. Sect. 96 would be almost purposeless if we were to have no power to take more than the exact amount wanted for the widening, it could in that case only apply where, owing to a change of plan, less ground was wanted than it was originally proposed to use. The Legislature gave an extensive discretionary power to this public body, considering that it was to be trusted as likely to exercise its discretion fairly. If they wanted land for widening the street the discretion is honestly exercised, though they take more with the intention of reselling it.

[FRY, L.J.:—Suppose we hold that the Commissioners can take part, if they want only a part for the purpose of widening the street, do you say that they can lawfully take the whole?]

Yes; in order that they may make a profit by selling the remainder—that being in furtherance of the objects of the Act. The Court considers powers of this kind given to a public body for the public benefit very differently from powers given to a railway company, which is promoting the scheme for the pecuniary benefit of its shareholders: *Galloway* v. *Corporation of London* (1).

[FRY, L.J.:—Lord *Cranworth* in that case speaks of raising money to pay the expenses of the improvements as one object of the Act.]

We do not rely upon it as a decision in point in the present case, but as laying down the above difference, and we use it as shewing that the Court will not be disposed to cut down as far as possible the extent of the powers, as it might be if the work was carried on for the purposes of private gain.

[FRY, L.J.:—Suppose the Commissioners wished to widen *Bell Yard*—could they take the whole Courts of Justice?]

The answer to that is, that the Legislature trusts the Commissioners to exercise their powers properly, and it is not to be supposed that they would think of widening a street if doing so involved the purchasing the *Law Courts*, or, as was put by Mr. Justice *Kay*, the *Bank of England*. *Thomas* v. *Daw* (2) was

(1) Law Rep. 1 H. L. 34. (2) Law Rep. 2 Ch. 1.

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referred to against us; but that case only decided that as the Commissioners had not adjudicated that the possession of the whole property was necessary, they could not give notice to take the whole, and Lord *Chelmsford* there says that it is competent to the Commissioners to adjudge that the whole of a house or building obstructs the improvements, and that if they do so honestly, though erroneously, their judgment cannot be questioned. The distinction drawn by *Kindersley*, V.-C., between houses and land applies in our favour. The outer walls are standing, and the lessees are under a covenant to reinstate the premises. The property therefore, must be considered as houses and not as land. Here the Commissioners have adjudged that the houses obstruct the improvement, and that possession of them is required for the purposes of their improvements, and the Court cannot go behind the adjudication.

[The question whether the right of pre-emption given by the 96th section of the Act was taken away by the *City of London Sewers Act*, 1851, s. 54, was not argued, the Court having determined not to hear argument upon it, unless they decided the principal point in favour of the Appellants.]

Rigby, Q.C., and *Theobald*, for the Plaintiffs, were not called upon.

BAGGALLAY, L.J.:—

In the latter part of the year 1882 seven houses in the city of *London*, which together formed one establishment for business purposes, and were situate in the angle between *Wood Street*, a well known street running north and south, and *Addle Street*, a street running to the eastward from *Wood Street*, were destroyed by a fire. Two of these houses fronted to *Wood Street*, and were known before the fire as Nos. 44 and 45 *Wood Street*. Immediately in the rear of these houses were the other five houses, which fronted to *Addle Street*, and were distinguished as Nos. 28, 29, 30, 31, and 32 in *Addle Street*. At the time when the circumstances occurred which we have now to consider, although the external damaged walls of the property remained, the internal

part was a mass of *débris*, though, as I gather from the surveyor's report, the foundations could all be seen upon the ground. Therefore all that remained was a piece of land covered with *débris*, with a wall looking to the west and another looking to the south.

The Commissioners of Sewers of the City of *London*, in discharge of the duty which they have to discharge for the public advantage, were desirous of taking the opportunity of this destruction of property to widen *Wood Street* at that particular point. They proposed also to widen *Addle Street*, but it is sufficient for my purpose to deal with *Wood Street*. It seemed to them that it would be desirable to set back the front of any new houses built on the site 5½ feet. They thereupon, in professed exercise of certain powers contained in the Act to which I am about to refer, gave the Plaintiffs notice to treat for the whole of this site for the purpose of making the improvements they contemplated, their intention being to widen the street to the extent of 5½ feet, and to use the rest of the site for building purposes. They contend that they were justified in taking the whole land with a view to turning it to advantage in the nature of a building speculation, so that they might make a profit on the transaction.

Thereupon the Plaintiffs commenced their action, and by their writ claimed an injunction to restrain the Commissioners of Sewers from proceeding on their notice to treat. A motion was made for an injunction, and very properly the parties agreed to have the question decided once for all on the motion for injunction, and to treat it as the hearing of the action. Mr. Justice *Kay* was of opinion that the Plaintiffs were entitled to the injunction they asked, and from this decision the present appeal is brought by the Commissioners.

The Appellants rely upon the 80th section of the Act 57 Geo. 3, c. xxix., intituled "An Act for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein." This Act is not limited to the city of *London*, but extends to the other parishes within the bills of mortality, and also to the two parishes of *St. Marylebone* and *St. Pancras*.

Now, in the first place, what was the object of the 80th section? We are told by its introductory words that it was passed "for the

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improvement of the streets and public places in the parochial or other districts within the jurisdiction of the Act, and for the public advantage." Now one can hardly think it was for the improvement of the streets, or for the public advantage, that more land should be taken than was wanted for the purpose of improving the streets, and these introductory words appear to indicate the intention of the Legislature. It then goes on to provide that for the said purpose it shall be lawful for the Commissioners to alter, widen, turn, or extend any of the streets. There are powers as to a variety of other things, but it is sufficient to refer to those. Then it goes on to provide that, if any houses, walls, buildings, lands, tenements and hereditaments, or any part thereof, shall be adjudged by the Commissioners to project into, obstruct or prevent them from so altering the streets, and that the possession thereof is necessary for that purpose, they shall have authority to treat with the owners. Now, pausing there for one moment, the Commissioners are first to see whether any houses, walls, buildings, lands, tenements and hereditaments, or any part thereof, project into or obstruct, or prevent them from altering the streets. Then if they come to that conclusion, and that the possession, occupation, and purchase of the houses, walls, buildings, tenements and hereditaments, will be necessary for the purpose, it is made lawful for the Commissioners to treat with the owners for the acquisition of the property, and to pull down, use, sell, and dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and such other lands, tenements, and hereditaments, or so much thereof as the Commissioners shall think proper, into the said streets or other public places. It is not limited to streets; there may be other places requiring land to be thrown into them for the purposes of improvement. I need not go into more detail as regards the subsequent part than to say that there is a provision that, in the case of the parties who receive notice and refuse to treat, or shall not agree, or by reason of absence or disability cannot agree, then a jury is to be summoned for the purpose of assessing the value of the land required.

It is upon the construction of sect. 80, as it appears to me, that the substantial question arises, and I quite agree with the obser-

vations made by *Kindersley*, V.C., and also by Lord *Chelmsford*, to the effect that it is a very clumsily drawn section. Now it appears to me that if the Commissioners honestly (I do not use the word "honestly" in contradistinction to dishonestly, but honestly in the sense of believing they may require the entirety of the property for the purpose of improvement) come to the conclusion that the possession of the whole of the property, and not merely of the part which would interfere with the improvement, is necessary for the purposes of the improvement, the words of this section are wide enough to enable them to make an adjudication to that effect. But this is a power of adjudication which must be exercised honestly, in the sense that it is to be exercised only where the circumstances of the case fairly warrant such a proceeding. It appears to me impossible to say that, because a narrow strip forming part of a large piece of land abutting on a street is required to widen the street, it is necessary to take the whole of the large piece of land behind it, and that is what the contention of the Appellants in the present case amounts to, so far as I understand the facts.

The case of *Thomas* v. *Daw* (1) has been referred to, and it appears to me that we are bound by it in dealing with the present case. I only desire to make this observation, that it appears to me upon the evidence which has been adduced in this case, that what has been required by the Commissioners is not to be regarded as a house or as a part of houses, but as part of a piece of land which once was the site of houses, but which by reason of this calamitous fire now consists of a piece of land with a quantity of rubbish upon it, and is to be regarded simply as land. That perhaps is an important distinction, having reference to the view taken by *Kindersley*, V.C., in that case, but as regards the view taken by Lord *Chelmsford* on appeal, I do not think it is material. In *Thomas* v. *Daw* there were two houses, Nos. 49 and 50, *Threadneedle Street*. The firm that occupied them had pulled down No. 49 first, and intended to pull down No. 50 in order to build new offices. The Commissioners then, acting upon the section to which I am referring, wished to widen the street, and for that purpose to take seven feet in depth of the

(1) Law Rep. 2 Ch. 1.

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front of the two houses, and after some discussion and changes of intention on their part, they eventually, in August, 1865, served the plaintiffs with a notice to treat for the purchase of the site of No. 49. The plaintiffs sent in a claim for £6000, and thus recognised the notice to treat as valid. After this the Commissioners served a notice to treat for No. 50. The plaintiffs thereupon filed their bill to restrain the Commissioners from taking the entirety of either house, seeking to restrict them to the strip seven feet wide which was required for the widening of the street. A distinction was drawn, both in the Court below and in the Court above, between the two houses, viz., that as regards No. 49 the plaintiffs had precluded themselves from obtaining relief, because they had assented to the receipt of the notice of claim, and had made their demand on the footing of it; but so far as regarded No. 50 it was held that the Commissioners could not take more than was required, and they were enjoined from taking any more.

In that case, *Kindersley*, V.C., seemed to think there was a distinction between houses and land, and that although, if the Commissioners had given a notice to treat for the whole of a house, there might be a difficulty in restricting them to the portion required, there would not be the same difficulty as regards mere land. Even upon the view of *Kindersley*, V.C., as it seems to me, the present case must be decided in favour of the Plaintiffs, because what is dealt with here is land only. But Lord *Chelmsford* on appeal did not take quite the same view as *Kindersley*, V.C., on this question, and what he says is this (1): "The Act under which the Commissioners of Sewers assumed the power to take the plaintiffs' premises is the 57 Geo. 3, c. xxix.," then after reading the 80th section of the Act, he proceeded: "This section is rather obscurely worded, but it appears to me to give the Commissioners power, if they please, to take part only of a house or building which may project into, obstruct, or prevent them from altering or widening any street." Therefore Lord *Chelmsford* was of opinion that the Act authorized them to take that part of the house which was required for the purposes of the Act, and then went on at some little length to shew why

(1) Law Rep. 2 Ch. 6.

he considered there was no distinction between houses and land, and that they could be restrained as far as regarded taking that part of a house which they did not want for the purposes of the Acts. It is true that Lord *Chelmsford* also gave another reason for his decision, but I need only refer to that part of his judgment which shews that he did not assent to the distinction taken by *Kindersley*, V.C., between houses and land.

The principles laid down by Lord *Chelmsford* in that case seem to me to apply exactly to the case now before us. We are dealing with a site which may be regarded as land only. Now, after the admission which is embodied in the order under appeal, it is impossible to say that there is a necessity to take the whole of this large piece of land for the purpose of making this small addition to the street. I am of opinion that the decision in *Thomas* v. *Daw* (1), being a decision of the Lord Chancellor, is a decision by which we are bound.

Reference has been made to *Galloway* v. *Corporation of London* (2). The circumstances in that case, as has been pointed out in *Thomas* v. *Daw*, were very different. In that case the corporation were not merely authorized to take what they might adjudge to be necessary for the purpose of the improvement they were about to effect, but lands were specified in the schedule to the Act of Parliament, and power to deal with them was given by the Act to the corporation. The case was urged in the Court below, and was urged upon us here, but it appears to me to have no bearing on the matter. Lord *Chelmsford*, who took part in the decision in favour of the corporation in *Galloway* v. *Corporation of London* is the Judge on whose judgment in *Thomas* v. *Daw* I now rely as an authority for my opinion.

For these reasons I think that the decision at which Mr. Justice *Kay* arrived in this case is the correct decision, and that therefore this appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion.

The Commissioners of Sewers in this particular case desire to widen the streets which have been mentioned, and for that

(1) Law Rep. 2 Ch. 1. (2) Law Rep. 1 H. L. 34.

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purpose to take a portion of the premises which were formerly the houses known as Nos. 44 and 45 *Wood Street*. They have adjudged under the Act 57 Geo. 3, c. xxix., that the freehold of these premises projected into and prevented them from altering the streets, and that the possession of these premises is necessary for the purpose of their so doing.

Now, before considering the law, we must first make up our mind whether these premises are in the nature of houses, or whether they are only land upon which houses stood, and in which of the two ways the Commissioners have treated them. It seems to me that they are no longer houses at all; they really consist of a piece of land covered with *débris*, and are no more houses than a mere *congeries* of timber which sticks upon a reef is a ship, when it has ceased to be capable of floating or being navigated or repaired. Mr. *Graham Hastings* and Mr. *Henderson* have contended with great ingenuity that there was a sort of equity to convert this in the eye of the Court into houses, but it seems to me that a property which has no building upon it except a front wall, partly perhaps in ruins, is not a house because there is a covenant to put it in repair.

But not only are these not houses, but the Commissioners do not seem to me to have treated them as houses. Knowing the difficulty they treated them as "premises." Therefore it is not necessary for us in this particular case actually to decide whether if part of a house projects into a street the Commissioners, though they only want the site of that part, are entitled to take the whole of the house. The logic that follows from our decision may or may not embrace that further point, but it is only necessary for us to say in this particular case they have no right, because they want $5\frac{1}{2}$ feet of the land upon which the house once stood, to take the whole of the land.

The Commissioners, in order to make good their case, must shew either that their adjudication is final, and that the Court cannot go behind it, or, if we can, under the circumstances of the case, penetrate behind the adjudication, they must shew that on the fair construction of the Act of Parliament they had the right to take the whole of the land when really they only wanted a small part.

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Now, first of all, with regard to the finality of the adjudication. Supposing that the Commissioners are not entitled to take the whole when they only want a part, it seems to me to be obvious that they cannot by simply asserting what is admittedly an untruth, clothe themselves with jurisdiction. They have, no doubt, a right to take what is necessary for their purposes, but the adjudication must bear some relation to reason. I do not say they must always be right, but there must be a probable ground which a reasonable person could take in support of their decision. If they have not the right to take the whole when they do not want it, their saying that they want the whole, when in the same breath they admit they only want one-fourth of it, will not help them. The circumstances would not in such a case be reasonably consistent with an adjudication that it was necessary to take the whole. We therefore have to decide, on the construction of the Act, whether the Commissioners have a right to take more than they want for the purposes of the improvement. Mr. *Graham Hastings* was driven by logic to say, and he does say boldly, not only that the Commissioners have a right to take the whole if they do not want it, but that they must take the whole though they do not want it, for if they are not obliged to take the whole there cannot be any necessity for them to adjudicate that the whole is required when they only want a part. The section is a very clumsy one, but in construing clumsy sections we must bear in mind what are the object and scope of the Act, and on that subject I agree with what the Lord Justice *Baggallay* has said. I also think that when we find large powers given to a body of Commissioners to interfere with private property, and there are two possible constructions of the words defining their powers, if on the one construction the Commissioners would have a sort of dictatorial power which it would be almost impossible to endure in a free country, and in the other of the two alternative constructions they are not clothed with such unreasonable power, but with a power more convenient and more limited, it is a very old canon on the construction of statutes, that the construction which leads to the least inconvenience of the two is to be preferred. That is what Lord *Coke* calls the "*argumentum ab inconvenienti.*" The extreme inconvenience of a construction of the Act which would oblige or even enable the

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Commissioners, if they wanted a corner of land for widening a street, to take the whole of a large property is a strong argument against such a construction. A large site of building ground which is very valuable to the owner is taken away from him because a part of it happens to be wanted for a kerb-stone! The Commissioners according to this contention, would have power to pull down the *Bank of England* if they wanted to widen *Threadneedle Street.* These are, I admit, extreme cases, but the argument must be tested by carrying it out to its consequences.

It appears to me also that the Lord Chancellor in *Thomas* v. *Daw* (1), though he did not decide the precise point now before us, laid down a principle which covers it. The words of the section, which first of all enable the Commissioners to put themselves in motion, indicate that they can only move if they seriously and distinctly determine that it is necessary to exercise their powers for the purpose of the improvement of the streets and public ways. They must then, in order to give themselves power to take, adjudicate, and adjudicate reasonably, "that some house, wall, building, land, tenements, and hereditaments, or some part thereof projects into the street." Now I am not satisfied that an adjudication that a house projects into the street would be justified by the fact that a bit of the house projects into it. I do not think it necessary to decide that point in this particular case, and I will assume for the purpose of the argument that such an adjudication would be good. Then comes the further adjudication which they must make "that the possession, occupation, and purchase of such houses, walls, tenements, and hereditaments will be necessary for that purpose." Mr. *Graham Hastings* contends that they are necessarily bound to adjudicate the whole of the land to be necessary even if they only want a part, while the case of *Thomas* v. *Daw* on the other hand, reads into the latter part of the section the words which occur in its earlier part "or any part thereof." I do not like saying that they were dropped out *per incuriam.* I prefer to say that in my opinion the general words in the latter part of the section, though differing from the general words in the earlier part of the section by the omission of those words "or any part thereof," are nevertheless so wide as

(1) Law Rep. 2 Ch. 1.

to embrace in themselves the part as well as the whole. I admit that this construction is not clear, but it seems to me that the opposite construction is not clear. It would be a very strong thing to clothe the Commissioners with an uncontrolled power of taking the whole of the property when they want only an infinitesimal part of it.

Our present decision only applies to lands, and it is not necessary for us to decide whether the same rule applies to a house. There may be this distinction between the two cases, that in the case of land nobody can reasonably say it is necessary for the Commissioners to take all when they only want a part, but it may be that in the case of a house or building it may be necessary to take all when they only want to use part on the improvements. That would be a question of fact in each case, and I must be understood as reserving myself perfectly free if the question arises hereafter for consideration.

FRY, L.J.:—

The Lords Justices who have preceded me have very fully expressed their opinions on this question, and their views upon this case are mine also.

The clause upon which the argument has mainly turned is undoubtedly a clumsily-drawn clause, and one difficult to construe. Certainly some scruples with regard to the construction of the clause occurred to my mind during the course of the argument. Those scruples have been removed by the authority of the case of *Thomas* v. *Daw* (1). We are confirmed at any rate with regard to the language of the clause by the authority of that case, and the reasons which the Lords Justices have already expressed in their judgments are so consistent and so reasonable, that I can only say I entirely concur in the opinions which they have pronounced.

This appeal therefore will be dismissed with costs.

Solicitor for Appellants: *E. A. Baylis.*

Solicitors for the Plaintiffs: *Walls, Abbott, & Martin.*

(1) Law Rep. 2 Ch. 1.

H. C. J.

C. A.
1885
Jan. 19.

In re WELD, A LUNATIC.

Sale of Share of Lunatic in Real Estate—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 116, 124 [*Revised Ed. Statutes, vol. xi., pp.* 684, 687].

The 124th section of the *Lunacy Regulation Act*, 1853, does not give jurisdiction to authorize the committee of a lunatic to sell the lunatic's undivided share of land to the owner of the other shares.

THE lunatic was entitled in fee to one-twenty-fourth share in the assembly rooms and some adjacent premises at *Ilfracombe*, subject, along with other hereditaments, to a mortgage for £7509 15*s.* 11*d.* The committee of the estate entered into a contract, subject to the approbation of the Court, to sell for £40 this twenty-fourth share to a person who had become the owner of the other twenty-three shares. The property was subject to the management of a committee to be elected by the part owners, who were to vote according to the number of their shares; no shareholder having more than three votes. The owner of this twenty-fourth share had therefore no control over the management, nor any power of limiting the liabilities contracted by the committee of management. Two of the houses had been burnt, and it was necessary for the part owners to contribute the sum by which the insurance money fell short of the cost of rebuilding. The Master certified the above facts, and found that it would be beneficial to the estate of the lunatic that the contract should be carried into effect. The case was now brought before the Lords Justices.

Barber, Q.C., and *Bagshawe*, for the committee:—

The *Lunacy Regulation Act*, 1853, s. 124, enables the committee, with the sanction of the Court, where a lunatic is entitled to a share in land, to concur with such other person in a sale as the Court may direct. It is submitted that these words will authorize a sale of the share to the other part owner.

[The Registrar handed up to the Court a paper, *In re Wool-*

house, in which Lord Justice *Turner* had held that an order could not be made in such a case (1).]

If there cannot be a sale of the share to the other part owner the sale might be effected by a sale to a third party, who might reconvey to the real purchaser.

[FRY, L.J.:—We ought not to sanction a sham sale.]

Then the Court may sell under sect. 116, for the purpose of paying the mortgage.

Dundas Gardiner, for the next of kin.

BAGGALLAY, L.J.:—

We should not be prepared to overrule the opinion of the Lord Justice *Turner*, though it does not appear that it was expressed in Court after argument. We therefore think that an order ought not to be made under sect. 124. We think, however, that an order for sale may be made under the 116th section.

FRY, L.J., concurred.

Solicitors: *Palmer, Eland, & Nettleship.*

(1) 19th March, 1858.

In re A. M. WOOLHOUSE, a Lunatic.

THE lunatic was entitled in fee to one moiety of one third share in a house and three acres of land. This moiety was let to *Archdale Palmer*, with whose estate this property was intermixed so that the boundaries could not be ascertained. The committee, on the 16th of February, 1858, entered into a conditional contract with *Palmer's* widow for the sale to her of the above moiety of a third at the price of £600. The Master certified that it would be for the benefit of the lunatic and his estate that the contract should be carried into effect, and submitted that the share should be sold under the 124th section of the *Lunacy Regulation Act*, 1853.

Upon the report were the following indorsements in the handwriting of the Lord Justice *Turner*.

"I think there can be no order.

"*G. J. T.*"

"The 124th section of the Act does not seem to me to contemplate the sale of an undivided share of an estate belonging to the lunatic, except in cases in which the owners of the other undivided shares concur in the sale. I very much incline to think therefore, that there is no jurisdiction to make this order unless the case can be brought within the 116th section. *G. J. T.*"

Below the above, was indorsed the following note:—

"It appears on inquiry of the solicitors that the case cannot be brought under the 116th section, and that the proposed purchaser is already possessed of the remainder of the property."

H. C. J.

C. A.

1885

Jan. 20, 21.

In re MAY.

National Debt Commissioners—Petition for re-transfer of Stock—Dismissal of former Petition by same Petitioner—Res Judicata—Discovery of Fresh Evidence—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 54, 55.

The jurisdiction given to the Court by sect. 55 of the *National Debt Act*, 1870, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Commissioners under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the Court is exercised.

Therefore, if a petition for the re-transfer of stock is heard on its merits, and is dismissed on the ground that the Petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, without leave of the Court previously obtained.

Decision of *Pearson*, J. affirmed.

APPEAL of the Petitioner from the decision of Mr. Justice *Pearson* dismissing a petition (1). The facts of the case are fully stated in the report of the proceedings before that learned Judge, and here it is only necessary to give the following short statement.

The petition was presented in June, 1882, under the *National Debt Act*, 1870, and claimed the transfer of certain stock bequeathed to *Elizabeth May*, the widow and residuary legatee under the will of *John May*, who was alleged to have been the owner thereof. The Petitioner claimed to be one of the next of kin of *Elizabeth May*, and as such had obtained a grant of administration *de bonis non* to her estate.

In the year 1867 the Petitioner had presented a similar petition under the Acts then in force relating to unclaimed dividends.

The petition came on for hearing before Lord *Romilly*, M.R., when an inquiry was directed in Chambers "who is or are entitled" to the stock. The Chief Clerk, by his certificate, certified that no sufficient evidence had been produced before him to enable him to ascertain "who is or are entitled" to the stock in question, and that no sufficient evidence had been produced to shew that the *John May* in whose name the stock had stood was identical with the *John May*, whose widow was the *Elizabeth May*

(1) 25 Ch. D. 231.

under whom the Petitioner claimed. The Petitioner took out a summons to vary the Chief Clerk's certificate in accordance with exceptions taken to it by him. The summons came on to be heard with the further hearing of the petition by *Jessel*, M.R., on the 24th of January, 1874; it appeared that the exceptions were not argued, and the summons and petition were dismissed.

The present petition contained an allegation that the Petitioner was in possession of further evidence in support of his claim. He had not, however, obtained any leave of the Court before presenting the second petition.

Lush-Wilson, for the Petitioner:—

The doctrine of *res judicata* does not apply to the dismissal of the former petition; it applies only where there are parties litigant: in the present case the National Debt Commissioners are mere stake-holders, and do not resemble the parties to a suit. As there are no parties litigant, there can be no estoppel between the Petitioner on the one hand and the Attorney-General and the Commissioners on the other. The doctrine of *res judicata* applies only when a record exists, and a petition of this kind is not a record. The language of the Chief Clerk's certificate shews that the question raised by the petition was never decided, and that the dismissal of the petition was merely equivalent to a judgment of nonsuit at Common Law: a judgment of nonsuit was no bar to a subsequent action.

Stirling, for the National Debt Commissioners and the Attorney-General.

Northmore Lawrence, for *J. W. Dudin*, the legal personal representative of *John May*.

Jan. 21. BRETT, M.R.:—

In this case we do not think we need trouble the counsel for the Commissioners and the Attorney-General. In the year 1867 a petition was presented under certain Acts of Parliament, which raised a claim of the petitioner, and that claim was opposed according to their duty, if there was any doubt about the matter, by those who are now represented by the Respondents. The case

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was sent into Chambers to be heard before the Chief Clerk, and the Chief Clerk made a certificate. That theoretically is the same as if it had been heard before the Judge himself. It was moved into Court; and the Judge, acting upon the certificate of the Chief Clerk, dismissed the petition. That is the same, therefore, as if between the parties the Judge had heard the evidence and then dismissed the petition, and given as his reasons that the Petitioner had not proved his case. Now in 1882 a new petition is presented by the same petitioner, raising precisely the same question, to be met by the same parties, the Commissioners. No leave has been obtained to present this new petition. Mr. Justice *Pearson* has dismissed this petition on the ground that no leave was given, and the question is whether he was right.

The counsel for the Petitioner has argued first of all that this is not *res judicata* because there was no record, and the doctrine of *res judicata* only applies where there is a record. To my mind that argument cannot be sustained. The doctrine of *res judicata* is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all Courts, that there must be an end of litigation, and that the parties have no right of their own accord, after having tried a question between them and obtained a decision of a Court, to start that litigation over again on precisely the same questions. Therefore this was a judgment, and, if there was nothing else the existence of the first judgment, would be a bar to the new litigation upon precisely the same point between the parties.

But the next point that the counsel for the petitioner urged was that the decision on the former petition was similar to and analogous to and the same as a judgment of nonsuit, because the reasons of the judgment were that the petitioner had not made out his case. There again I differ from him. I think that it has not the smallest resemblance to a judgment of nonsuit, as it was called: a judgment of nonsuit was in truth no judgment at all. It was a withdrawal of the case at a stage before judgment and it was before verdict, a verdict being the essential matter upon which the judgment passed as a matter of course. The decision upon the petition is not in the least like a judgment of nonsuit.

What is the state of things? This form of petition was part of the practice in the old Court of Chancery. In a Court of Common Law if a verdict was obtained and was unsatisfactory to the parties they had to move for a new trial, which in effect was to get the leave of the Court to have a new trial; and they had to do that upon some one or more of the grounds which the Court had determined were the only grounds on which they would give that leave, namely, on the ground of misdirection, on the ground of the verdict being against evidence, or on the well-known ground of a much larger jurisdiction which the Common Law Courts eventually reserved to themselves, namely, that although there was not positively any misdirection, and although the verdict was not actually against the evidence, yet, if on the whole the verdict was unsatisfactory, they reserved to themselves the right to grant a new trial, that is, to give leave to parties to have a new trial on the old proceeding. But the Court of Chancery went somewhat further, and, when there had been a judgment, if, upon motion for leave to re-open the issue, in the opinion of the Court satisfactory reasons were shewn, they gave leave; and therefore, if leave had been asked to present this new petition, it being suggested that there was new evidence, or any other reason being alleged which would satisfy the Court, the Court might have given leave; but according to the course of practice of the Court of Chancery the parties never could themselves begin a new litigation where there had been a judgment before, of their own accord. The parties could only do it upon reasons shewn to the Court, satisfactory to the Court, and after the Court had given them leave. Therefore this new petition fails on the ground upon which Mr. Justice *Pearson* put his decision, namely, that this new litigation could not be commenced without the previous leave of the Court being obtained, which had not been obtained. I am of opinion that the application fails.

COTTON, L.J.:—

I am of the same opinion; and I must consider what this proceeding is, because a good deal of the argument of the Petitioner's counsel was pointed to this, that this is no litigation, but merely a proceeding by petition. That is perfectly immaterial. A petition

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is just as much a litigious proceeding as a bill filed in the Court of Chancery, if there is jurisdiction to bring the parties before the Court on it. This was a petition on the ground that some stock was standing in the name of *John May* which had been transferred to the account of the Commissioners for the Reduction of the National Debt, and the *National Debt Act*, 1870, gives the means by which any person who is really entitled to stock which is so transferred (it being only transferred because dividends have not been received,) is able to get what has been so transferred with the accumulated dividends. If he applies to the *Bank of England* under sect. 55 of the *National Debt Act*, 1870, the *Bank of England*, if they are satisfied, can direct a retransfer. If they are not satisfied—and the *Bank of England* except in a clear case does not take upon itself to transfer—he must present a petition to the Court, and he must serve it not only on the Commissioners for the Reduction of the National Debt, but on the Attorney-General. The Attorney-General and the Commissioners for the Reduction of the National Debt are served as representatives of the public, against whose funds the claim is under these circumstances made. That is obvious. If the only fact were that the stock had been transferred to the Commissioners, of course they would be holding it for the discharge of their public duties; but there is an express clause, sect. 54 of the Act, which says that all such dividends and the stock arising from the investment thereof shall be held by the Commissioners for the public "subject to the claim of the parties entitled thereto." So, on this petition as on the previous petition the petitioner was insisting, as against the public represented by the Attorney-General and the Commissioners for the Reduction of the National Debt, that he was entitled to this fund, which was then in the hands of the Commissioners to be applied, if no one made out his claim, for the benefit of the public.

That being so, was the decision of Mr. Justice *Pearson* right? It is always necessary that parties should not be at liberty of their own accord to litigate their case again on fresh evidence. If a person litigates his case, he ought to come with such evidence as he thinks will prove it, and it would be perfectly wrong in principle to allow a man who has failed on the evidence which he

thought was sufficient, and which he contended was sufficient, to establish his title, on a fresh petition (especially in a case like this, where the question is the identity of the ancestor of the present Petitioner with the stockholder), and when he has found that a link was missing in the evidence, to come forward, knowing exactly where the blot is, and try to get the case tried over again with the old evidence and the evidence which he has since discovered, in order to meet that blot. Is not the principle here applicable which applies to the old established practice in the Court of Chancery, where a person, not on the ground of error of law, but on the ground that the Court has come to a wrong conclusion upon the effect of the evidence, wishes to litigate the question over again? There was a well known form of proceeding. If a judgment was obtained in a suit against the plaintiff because he had not made out his case as a matter of evidence, he could not any more relitigate the question without coming to the Court and getting leave to file what was called a supplemental bill in the nature of a bill of review. That was to review the whole judgment by supplemental evidence, brought forward in order to enable the Court or require the Court to come to a different decision. Now what did the Court require under those circumstances? Unless leave was granted, there would be a plea or other proper defence to the suit; but what the Court required was this, that before any such bill could be filed, the person desiring to file it and to bring forward further evidence should come and get the leave of the Court, satisfying the Court not only that the evidence which he proposed to adduce was material, but that he had not got it when he litigated the question on the former occasion, and that he could not by reasonable diligence have acquired that evidence. If he failed in any of his points, then the Court refused to grant the leave, and the former order was considered as final. Here what was the order? It was an order dismissing the petition, that is to say, it was an adjudication in the year 1874 on the previous petition. The Chief Clerk's finding was like a verdict of a jury; he found certain facts, and then it was open to the petitioner to take exceptions, which he did, but he apparently did not argue them. It was open to him then to ask the Court to make no order, but to let the matter stand over,

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so that the Petitioner might see whether he could bring forward further evidence. That was not done. The Court thought it was not right to grant the petition. I believe from what was said that nobody appeared at the dismissal of the petition in 1874, and therefore it was not argued, but an order was made dismissing the petition. That was an adjudication as between the Petitioner and those who are Respondents that the Petitioner had not established his claim, that is, had failed in his claim as against the Attorney-General and the Commissioners for the Reduction of the National Debt. Without going into any minute and subtle argument as to whether this could be pleaded as *res judicata*, it comes clearly, to my mind, within the principle applied to a supplemental bill in the nature of a bill of review, and it would be wrong, in my opinion, that any person having once got a decision on his petition seeking a retransfer of funds, should be at liberty thereafter, because he had got further evidence, without any leave of the Court, to present a further petition and again litigate the question which was decided on the former petition, namely, whether or no he was the representative of the person who was the original stockholder. In my opinion Mr. Justice *Pearson* was perfectly right, and it would be a most unfortunate opening for litigation in these cases, if a fresh petition could be presented without those safeguards which are required when a person files a supplemental bill in the nature of a bill of review.

LINDLEY, L.J., concurred.

Solicitor for Petitioner: *B. Hope.*
Solicitors for Commissioners and Attorney-General: *Hare & Co.*
Solicitors for *J. W. Dudin*: *Druces, Jackson, & Attlee.*

J. E. H.

In re BEDSON'S TRUSTS.

C. A. 1885 Jan. 22.

Will—Construction—Life Estate determinable on Bankruptcy—Gift over to Children—Time for ascertaining Class—Canons of Construction.

A testator gave a fund to trustees upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally among all the children which the son might have, as and when they should respectively attain twenty-one, and if the son should leave no child who should attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that if the son should be adjudicated bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son "in the same manner as if he was naturally dead" or in default of such child or children should sink into the residue. After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards:—

Held (affirming the decision of *Pearson*, J.), that the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one.

Observations upon the force of canons of construction.

THIS was an appeal by the Petitioners, two children of *William John Bedson*, born before his bankruptcy, from the decision of Mr. Justice *Pearson* as to the children of *Wm. J. Bedson* entitled to share in a sum of £1200, bequeathed by the will of *C. R. Webb Bedson* (1). By this will the testator gave such £1200 to trustees upon trust during the life of his son, *William John*, to pay the income to him or for his benefit, and after his death upon trust to pay and divide the £1200 unto and amongst all the children which such son might have, share and share alike as and when they should respectively attain twenty-one, and if his son should die without leaving any such child who should attain such age, then he directed the said sum of £1200 to sink into and become part of the residue of his estate and effects. There then followed a proviso that if the testator's said son should, *inter alia*, commit any act of bankruptcy whereupon he should be adjudicated a bankrupt, that then "the said sum of £1200 and the interest, dividends, and proceeds shall thenceforth immediately go and be payable and

(1) 25 Ch. D. 458.

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applicable to or for the benefit of the child or children" of the testator's son *William John* "in the same manner as if he was naturally dead, or in default of such child or children" should sink into and form part of the residue of the testator's estate and effects.

The testator died on the 20th of June, 1858. His son, *William John*, was adjudicated a bankrupt on the 22nd of September, 1865. At that time he had two children, the Petitioners. After his adjudication of bankruptcy he had four other children born to him, and the petition was to apply the fund of £1200 (which the trustees had paid into Court) for the benefit exclusively of the two children born before the adjudication of bankruptcy. Mr. Justice *Pearson* was of opinion that the children born after the bankruptcy were entitled to share in the fund contingently upon their attaining twenty-one, and he decided accordingly.

The Petitioners appealed.

Alfred Bailey, for the Appellants:—

The class of children of the testator's son who were to take under this bequest must be such as could be ascertained at the bankruptcy of the son. That was the opinion of *Wickens*, V.-C., on the construction of a similar bequest in *In re Aylwin's Trusts* (1). *Rochford* v. *Hackman* (2) was where there was only an implied gift over in the event of bankruptcy, and therefore distinguishable from the present case, where the effect of the proviso is to create a new independent gift to the children. The class is to be ascertained at the time the distribution is to take place. "Where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i.e.*, the period when the fund becomes distributable in respect of any one object, or member of the class. And the result is the same where the expression is 'all the children.'": *Jarman* on Wills (3), *Whitbread* v. *Lord St. John* (4), and *Walker* v. *Shore* (5). The case of *Re Smith* (6)

(1) Law Rep. 16 Eq. 585.
(2) 9 Hare, 475.
(3) 4th Ed. vol. ii. p. 160.
(4) 10 Ves. 152.
(5) 15 Ves. 122.
(6) 2 J. & H. 594.

is in point. There *Page Wood*, V.C., held that the interest of the father of the children in the trust fund determined on his insolvency, and that the class of children entitled went on until the eldest attained twenty-one, when it was closed.

W. Brinton, for the children born since the bankruptcy:—

There was a distinct gift to all the children which the testator's son might have, and there is nothing to restrict or cut that down to such children only as should be living at the bankruptcy of such son. The case of *Rochford* v. *Hackman* (1) shews that the proviso did not alter the class who were to take.

A. Bailey, in reply.

BRETT, M.R.:—

I agree with the late Master of the Rolls that the artificial rules which have been laid down for the construction of wills have been carried too far, and that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules. What I am saying does not apply to wills of real property, in which well known technical phrases as to realty are used, and where, therefore, such wills should be construed according to the established technical meaning of such words of art. One general rule as to the construction of any instrument is that one should give words their ordinary meaning in the English language, and should neither add to nor take anything away from such words unless one be obliged to do so, and another rule is, that unless obliged, one should not construe an instrument in such a way that one part would contradict the other part. Then, applying these canons of construction to the will in the present case, the decision of Mr. Justice *Pearson* appears to me to be right, or at all events not so clearly wrong that it should not be upheld. In the first part of the will the testator gives £1200 to trustees upon trust to pay the income to his son, *William John*, during his life, and after his death upon trust to pay and divide the £1200 to and amongst all the children his said son may have when they

(1) 9 Hare, 475.

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shall attain twenty-one. That is a plain bequest, with regard to which nobody would have any doubt that the income was to be paid to the testator's son for life, and that after his death the fund was to be divided amongst all the children of such son who should attain twenty-one. We have no right, I think, to cut that bequest down and to alter its meaning by anything which is afterwards expressed in the will. What is expressed in the proviso which follows this bequest is a condition put on the life interest of the testator's son, namely, that if he should be adjudicated a bankrupt he should not have the income which was given to him for his life. That does not alter the bequest, but attaches a condition to it, and then the will states that in that event the fund so bequeathed is to go and be applicable "to or for the benefit of the child or children" of the testator's said son, "in the same manner as if he was naturally dead." Is that to have the effect of altering the bequest in the first part of the will, or can one give effect to the condition contained in the proviso without altering such bequest? It appears to me that one can, for the condition does not apply to the children, but to the son only, and it does not therefore affect the children. In order to read it in the way proposed by the Appellants, it would be necessary to insert after the words "for the benefit of the child or children of my said son," the words "who may be then living." That is a strong reason against the construction contended for by the Appellants, and if I had had to construe this will in the first instance, I should have held as Mr. Justice *Pearson* did, and certainly I see no reason why his decision should be overruled.

Cotton, L.J.:—

I have made up my mind that the decision of Mr. Justice *Pearson* is right, though I have arrived at that conclusion by a somewhat different way, I think, than he did, and certainly by a different way than the Master of the Rolls. As regards the construction of wills, I cannot agree to the departure from well-known rules of construction which apply unless the testator has expressed a different intention by the words which he has used, when of course such rules will not apply. I take it that it is a well known canon of construction that when there is a gift to a

class, as soon as the gift is divisible and there are members of the class entitled to receive their shares, the class cannot be added to. This is thus expressed by *Page Wood*, V.C., in *Re Smith* (1): "As long as a fund is in hand, the general rule is, that new members of the class may be let in. The time when the money is distributable is the time for ascertaining the class, after which no more can be let in. Children born after the fund becomes divisible are not entitled to share." That is a well established rule, and is not to be departed from in this case. Here there is a gift to a class of children subject to their attaining the age of twenty-one, and that class is to be ascertained at the death of their father. Then the testator has by his will determined the life interest of the father in the event of his becoming bankrupt, but in a very awkward way, because what he has said is this, that in the event of his said son being adjudicated a bankrupt, "the said sum of £1200, and the interest, dividends, and proceeds, shall thereupon immediately go and be payable and applicable to or for the benefit of the child or children" of his said son "in the same manner as if he was naturally dead." The Master of the Rolls considers that the construction contended for on the part of the Appellants would necessarily require the introduction of these words, "who may be then alive," after the words "children of my said son." I do not think so. When there is a gift to a class at a particular time, as soon as the time for division is past the class is fixed, and no such words as suggested are necessary. What, however, we have to consider is whether there is any intention in the will to give in the event of bankruptcy to a different class from that which would have taken under the previous gift. I have come to the conclusion, though with some difficulty, that the testator did not mean that the class mentioned in the previous gift should be disturbed. The difficulty is that the testator has directed, not only the interest and dividends, but the sum of £1200, immediately to go and be payable for the benefit of the children of the son as if he were naturally dead. It is an awkward way of determining the son's life interest, but I think the result is this: The testator having given the fund to all the children of his son *William John* who might be living at

(1) 2 J. & H. 601.

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his son's death, and attain twenty-one, either before or after such death, is now dealing with the case of the determination of the life interest of the son in consequence of bankruptcy, and although he directs the fund, as well as the interest, to go and be payable for the benefit of the children in the same manner as if the son were naturally dead, he does not, in my opinion, mean to alter the class who would have taken on the death of the son. He means in the event of the children being infants at the time of the son's bankruptcy, to authorize the dividends to be applied for their benefit, and I think when he directs the fund, and interest, and dividends to go and be applied in the way I have mentioned, he does not mean to give to a new class, but to give the fund for the benefit of the class which is to take under the previous gift, and to make it applicable at once as if the son were dead, that is to say, setting aside the son's life interest, the fund is to go to the same class who would take under the previous part of the will, with a direction that the interest be applied for their benefit until the fund becomes distributable, which is not until after the son's death.

LINDLEY, L.J.:—

I think that the decision of Mr. Justice *Pearson* was right. The construction put upon the will by the Appellants is too forced. They fasten upon some ambiguous words in order to produce an effect which I am satisfied the testator never contemplated. If we were to give effect to the construction of the Appellants we should be driven to say that the testator drew a distinction between one class of grandchildren and another. He did draw a distinction between those of his grandchildren who should attain twenty-one and those who should not, but there is no indication from the will that he ever dreamt of preferring the elder to the younger grandchildren. The whole difficulty arises from the bankruptcy clause. There is a proviso as to what is to happen if the testator's son, *William John*, becomes bankrupt. [The Lord Justice here read the proviso.] It is to be observed the proviso speaks of the £1200 and the interest and dividends, and I think the words "interest and dividends," are not without some signification, inasmuch as they shew that the £1200 might be still

invested. Then it says that in the event of bankruptcy of the son, the fund and interest, dividends and proceeds, are to go as if he were naturally dead. It does not say they are to go then as on his death, but we are asked to say that that is the true construction, the consequence of which would be that his children who were alive at the time of his bankruptcy would, on their attaining twenty-one, take their interest, and the children he might afterwards have would take nothing. That is not what the will means. I think that the real meaning is that in the event of bankruptcy of the son, such son's life interest is to cease, and the children are to take the interest in the fund as in the case of such son's death, but not that the fund is to be then divided amongst a particular class of children to the exclusion of any other class. The period of distribution of the fund is not the bankruptcy but the death of the testator's son. It therefore appears to me that the construction put on the will by the learned Judge is right, and that this appeal should be dismissed.

Solicitors: *Chester, Mayhew, & Co.*, agents for *Cooper & Chawner, Uttoxeter.*

W. P.

In re TWEEDY.

New Trustees, Appointment of—Petition—Vesting Order in Chambers—Transfer of Stock—Business in Chambers—Jurisdiction—Trustee Act, 1850, *ss.* 2, 32, 35, 40 [*Revised Ed. Statutes, vol. x., pp.* 982, 990, 991]—*Trustee Extension Act*, 1852, *s.* 6 [*Revised Ed. Statutes, vol. xi., p.* 327]—*Master in Chancery Abolition Act*, 1852 (15 & 16 *Vict. c.* 80), *ss.* 11, 26, 27 [*Revised Ed. Statutes, vol. xi., pp.* 445, 447]—*Despatch of Business Act*, 1855 (18 & 19 *Vict. c.* 134), *s.* 16 [*Revised Ed. Statutes, vol. xii., p.* 813]—*Cons. Ord.* XXXV., *r.* 1—*Judicature Act*, 1873, *s.* 16—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2 (8), (18)—*Statute Law Revision and Civil Procedure Act*, 1883, *s.* 5.

On a petition for the appointment of new trustees and a vesting order, an order was made in Court on the 28th of June, 1884, that two or more proper persons should be appointed trustees, and that an inquiry should be made of what the trust funds consisted; and the parties were to be at liberty to apply in Chambers for an order to vest the trust property in the new trustees when appointed. On the 22nd of July, before any certificate as to the trust funds had been made, an order was made in Chambers appointing new trustees, and directing that the right to call for a transfer of, and to transfer

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into their own names, certain sums of stock specified in the order "may" vest in the new trustees. This order mentioned, but did not recite, the order of the 28th of June. The *Bank of England* refused to act on it, and *Bacon*, V.C., on the 28th of November, made an order directing them to do so. The bank appealed:—

Held, that, the matter having been properly brought before the Court on petition, the Judge had power under the provisions of the *Masters Abolition Act*, 1852 (15 & 16 Vict. c. 80), to dispose in Chambers of such parts of the matters brought before him on the petition as he thought could be more conveniently disposed of in Chambers than in Court, and that there was therefore jurisdiction to make the order of the 22nd of July.

Frodsham v. *Frodsham* (1) distinguished.

But *held* that the order was so irregular in form that the bank were justified in declining to act upon it, they being entitled to require a vesting order to be in such a form as to shew that the statutory requirements have been satisfied.

Statement of the recitals which ought to be contained in a vesting order made in Chambers under the *Trustee Act*.

BY an order made by Vice-Chancellor *Bacon* in Court on the 28th of June, 1884, on a petition by Lady *Torrens* in the matter of the trusts of the will of *Violet Tweedy*, and in the matter of the *Trustee Acts*, for the appointment of new trustees and a vesting order, it was ordered that two or more proper persons should be appointed trustees of the will in the place of the two surviving trustees, one of whom was out of the jurisdiction, and the other had been gazetted a bankrupt in *Scotland*. And that an inquiry should be made of what the trust funds subject to the will consisted. "And the parties are to be at liberty to apply in Chambers for an order to vest the trust estate in the new trustees when appointed, and to apply generally as they may be advised."

On the 22nd of July, 1884, an order was made in Chambers "upon the application of *Barbara Torrens*, the wife of Sir *R. R. Torrens*, and upon hearing the solicitors for the applicant and for the respondents, the said Sir *R. R. Torrens*, *V. A. Veitch*, and *L. P. Pike*, widow, and upon reading the order dated the 28th of June, 1884, made upon the petition of the applicant on the 23rd of May, 1884, preferred into this Court" (and certain affidavits), "And it appearing to the satisfaction of the Judge that *J. Rawes* and *W. Brydone*, two of the trustees of the will of the above-named testatrix, *V. Tweedy*, are dead, and that *P. S. Lang*, one of the

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trustees of the said will, is out of the jurisdiction of this Court, and that *W. H. Brydone*, the remaining trustee, has been gazetted a bankrupt, and that it is expedient to appoint new trustees of the said will, but impracticable to do so without the assistance of this Court, and that the Petitioner and Respondents are beneficially interested in the property subject to the trusts of the said will, and that the several sums of *East India* stock hereinafter mentioned are comprised in the property subject to the trusts of the said will, the Judge doth hereby, in pursuance of the order made on the said petition, appoint " *N. D. R.* and *W. S. P.* trustees of the will in substitution for the deceased and surviving trustees, " and that the right to call for a transfer of, and to transfer into their own names," certain sums of *East India* £4 per cent. stock standing in the names of the four trustees, and an annuity of £36 2*s.* 4*d.* with the *Scottish Provident Institution*, and an annuity of £110 8*s.* with the *Life Association of Scotland*, both standing in the names of two of the trustees, and £19 18*s.* 6*d.* standing on deposit with the *British Linen Company*, and the payments now due and to accrue due thereon, " *may* vest in the said *N. D. R.* and *W. S. P.* as such trustees as aforesaid. That the right to sue for and recover " the said sums of *East India* stock, annuities, and money on deposit, " or any *chose in action* subject to the trusts of the will, or any interest in respect thereof, may vest in the said *N. D. R.* and *W. S. P.* as such trustees as aforesaid."

On the 9th of October, 1884, the Petitioner's solicitors left at the *Bank of England* office copies of the above orders, for the purpose of having the stock mentioned in the second order vested in the new trustees, but on the 13th the bank returned the orders with the following note by the solicitor to the bank indorsed on the order of the 22nd of July, 1884: " This order is not sufficient. It is a vesting order made in Chambers, and as the law now stands I cannot advise the *Bank of England* to act upon it." The bank accordingly refusing to act on the orders, the Petitioner moved for an order requiring the bank to act in accordance with the order of the 22nd of July, and also asked that the bank might be ordered to pay the costs of the application.

Although the order of the 22nd of July specified the trust funds to which it applied, the inquiry directed by the order on

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the petition was not answered until the 8th of November, 1884, subsequently to the objection raised by the bank. By his certificate of that date the Chief Clerk certified that the trust funds subject to the will consisted of (amongst other property) certain specified sums of *India* stock, being the same as those mentioned in the order of the 22nd of July.

Upon the motion coming on for hearing on the 28th of November 1884, it was stated at the bar that the bank then heard of the certificate for the first time.

Marten, Q.C., and *Birrell*, for the motion:—

We submit that the order of the 22nd of July is perfectly regular. In the first place, with regard to the appointment of new trustees, although the order of the 28th of June does not in terms say that the appointment shall be made in Chambers, yet a reference to Chambers for the purpose is in accordance with the recognised practice of the Court. In the next place, it will, we understand, be contended that an inquiry having been directed as to the trust funds, there was a difficulty in acting under the second order before the inquiry had been answered. But that order on the face of it shews that the inquiry had in fact been answered although the certificate was not made until afterwards. The vesting order was perfect in form, assuming there was jurisdiction to make it in Chambers. The *Trustee Act*, 1850, empowers (sect. 32) the Court to make an order appointing new trustees, and (sect. 35) "by the same or any subsequent order" to vest the right to call for a transfer of any stock subject to the trust in the trustees; the word "stock" being defined in sect. 2 to include "any fund, annuity, or security transferable in books kept by any company." Sect. 40 enacts that an order under the statute may be obtained on "petition." Then sect. 6 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), requires the *Bank of England* to act on any vesting order made under the *Trustee Act*, 1850. So that in the present case the matter was properly commenced in the first instance by petition brought before your Lordship in Court, and the only question is whether you had jurisdiction to make the vesting order in Chambers. The *Master in Chancery Abolition Act*, 1852 (15 & 16 Vict. c. 80), enacted (sect. 26) that

the business to be disposed of by the Judge in Chambers should consist of the matters there specified "and such other matters" as the Judge should see fit, or "as might from time to time be directed by any general order": and s. 27 empowered the Judge to adjourn any matter into Chambers. Then s. 16 of the *Despatch of Business Act*, 1855 (18 & 19 Vict. c. 134), provided that the business in Chambers should comprise such of the matters in respect of which the Court was empowered to make orders in a summary way as should be directed by general order. Cons. Ord. XXXV., rule 1, directed that the business to be disposed of by the Judge in Chambers should include (sub-sect. 4) applications under the *Trustee Act*, 1850, and the *Trustee Extension Act*, 1852, but only where any decree or order should have been made for the sale of any hereditaments. Thus matters stood when the *Judicature Act*, 1873, was passed, by which (sect. 16) the jurisdiction of the Court of Chancery was transferred to the High Court. Then by the Rules of the Supreme Court, 1883, Ord. LV., r. 2, an important addition is made to Cons. Ord. XXXV., r. 1, sub-sect. 4, for it is provided that the business to be disposed of in Chambers shall include (sub-sect. 8), "Applications under the *Trustee Acts*, 1850 and 1852, in all cases where a judgment or order has been given or made for the sale, conveyance, *or transfer of any stock*, or of any hereditaments:" and sub-sect. 18 includes "such other matters as the Judge may think fit to dispose of at Chambers." The *Statute Law Revision and Civil Procedure Act*, 1883, by which certain enactments regulating Chancery procedure are repealed, does not affect (sect. 5 (b)) the jurisdiction transferred to the High Court by the *Judicature Act*, 1873. Such then has been the course of legislation on this question. There are two authorities as to the jurisdiction to make vesting orders in Chambers under the *Trustee Acts*. The first is *Frodsham* v. *Frodsham* (1) decided in 1880, before the new Rules of procedure. There the late Master of the Rolls held that the Court had jurisdiction to make a vesting order in Chambers, but the Court of Appeal thought the point open to so much doubt that they discharged the order in that case, directing the bank to act on the vesting order. In that case the proceedings commenced by writ, not

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petition. Here the proceeding was by petition, and in the order made on that petition was inserted an express direction that application for a vesting order should be made in Chambers. The next case is *In re Moate's Trust* (1), also before the new Rules, where *Chitty*, J., distinguished *Frodsham* v. *Frodsham* (2) and held that the Court had jurisdiction to adjourn the further hearing of a petition under the *Trustee Relief Act* into Chambers. Then came the new Rules of the Supreme Court, 1883, Ord. LV., rule 2, already referred to, the words "or transfer of any stock" in sub-sect. 8 having been inserted to meet the difficulty in *Frodsham* v. *Frodsham*. That sub-section and the 18th put an end to any question of a supposed repeal of the *Master in Chancery Abolition Act*, 1852, and directly authorized a reference to Chambers under a petition of this nature.

Kekewich, Q.C., for the *Bank of England*:—

I rely upon *Frodsham* v. *Frodsham* as an authority that a vesting order made in Chambers in such a case as the present is irregular, and I submit that the law as there laid down has not been altered by the new Rules. If your Lordship had here directed a vesting order to be made in Chambers as to specific sums of stock, then the case might have fallen within Order LV., r. 2; but your Lordship was not in a position to do that, for, not being satisfied, on the petition, that the trust property was correctly described, you directed an inquiry upon the subject. That inquiry had not been answered by certificate, in the usual way, before the vesting order was made, so that this order was made upon a separate application to vest sums of stock which had not yet been ascertained. It is important for the protection of the public that vesting orders should not be made in Chambers, for, as *Cotton*, L.J., pointed out in *Frodsham* v. *Frodsham* (3), Chambers are not a public Court. I agree that the words "transfer of any stock" in sub-sect. 8 of Order LV., r. 2, were inserted for the first time, and were intended to hit such a case as *Frodsham* v. *Frodsham*: here, however, there has been no order for "transfer of any stock," but only an order vesting the right to call for a transfer—a different order altogether. The "matters" to be

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disposed of "in Chambers" must mean only such matters as the Court has power to dispose of in Chambers, and *Frodsham* v. *Frodsham* (1) has decided that what are commonly called vesting orders, that is, orders merely vesting the right to call for a transfer of stock, not actual orders for transfer, cannot be disposed of in Chambers. The question in *In re Moate's Trust* (2) was solely whether the Court had jurisdiction to adjourn the further hearing of a petition under the *Trustee Relief Act* into Chambers: the question as to jurisdiction to make a vesting order in Chambers did not arise. In point of fact the bank has never taken an objection to the mere adjournment of a petition into Chambers. I rely on the circumstance that there has not been any adjudication by the Court on petition that there should be a vesting order of these particular sums of stock; and I maintain that the question whether such an order should be granted ought to be considered on petition and not on a summary application in Chambers.

BACON, V.C.:—

No doubt it is of very great importance that all possible vigilance should be exercised upon the subject of such orders as that which is before the Court at this moment, and nobody can in the least complain of the *Bank of England*, who of course are not desirous of impeding in any way the operation of any order which has been made. They are quite ready to give great care and attention to any order which they are asked to carry into execution or give effect to, and I do not blame them for the course they have taken on the present occasion. After the decision in *Frodsham* v. *Frodsham* I cannot say that the *Bank of England* were wrong if they hesitated to act on the order.

However, when the matter is examined, I think it is clear. I am very much obliged to Mr. *Marten* for the care with which he has collected and gone into the various Acts of Parliament and general orders, and for the trouble he has bestowed upon the matter; but, at the same time, I cannot think that they have much to do with the question before me. I have to decide upon the law as it exists.

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The right of the Court to entertain the petition is not in question. The right of the Court to adjourn to Chambers the further hearing either of the petition itself or the inquiry into any of the matters contained in the petition is not the question in dispute. The right to act in Chambers is clear, and is plainly authorized by the Legislature, and is confirmed by everyday practice.

Frodsham v. *Frodsham* (1) decided only this—that, inasmuch as the proceeding ought to have been by petition, the Court would not enforce the order against the *Bank of England* where the proceeding had not been by petition. The law has been altered since that. The law, as it stands now, is that where a proceeding originated by petition is heard by the Court, in Court, the right exists in the Court to adjourn that petition and every part of it into Chambers to be further disposed of. The Court has so dealt with the present petition; for by the first order—that of the 28th of June, 1884—it directs the appointment of new trustees, and it directs an inquiry. It does not dispose of the whole matter before it: it disposes of a part conclusively by a decree, or that which is equivalent to a decree. It directs an inquiry of what the trust funds subject to the will of the testatrix consist, and it says "and the parties are to be at liberty to apply at Chambers for an order to vest the trust estate in the new trustees when appointed, and to apply generally as they may be advised,"—that is, to apply for an order to vest the trust estate when the previous inquiry shall have been satisfied. The previous inquiry, I am told, has been satisfied, though Mr. *Kekewich* says that he has heard that to-day for the first time. I do not think that of the least importance; for, when I come to the second order, which the Judge made in Chambers (and the same Judge is supposed to be acting throughout), I must assume that the inquiry has been made and that the result has been satisfactory to him. By that order the Judge (stating it shortly) appoints the new trustees, and says they have the right to call for the transfer of and to transfer into their own names the sums there stated, and that the right to sue for and recover the sums mentioned is vested in them.

This matter seems to me to be entirely free from the objection

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which was taken in *Frodsham* v. *Frodsham* (1), and it resolves itself into one of the commonest applications that can be made to the Court. The right to appoint new trustees is recognised as inherent in the Court, so also is the right to name the trustees, and the right to inquire of what the funds which are to be transferred to them consist. Those rights are exercised: and it having been ascertained that the fund consists of the sums here mentioned the trustees are appointed, and the right to call for a transfer is vested in them.

I think *Frodsham* v. *Frodsham* has no application whatever to the present case. The decision in that case rested on the narrow question whether in a proceeding commenced by action—not petition—the Court had jurisdiction to make a vesting order in Chambers. The right of the Court to deal with the subject-matter of the present case is clear: nobody can doubt it for one moment. New trustees have been appointed in the place of former trustees: the right to call for a transfer of the trust fund is vested in those new trustees: the legal right to the fund in question is vested in them. It remains only that the bank should perform a ministerial office and give full effect to the order the Court has made, and that the funds should be transferred into the names of the trustees.

I have not heard that such an order cannot be made in Chambers. It is not right that the bank should be present on the inquiry of what the trust funds consist. To ascertain that is the duty of the Court, and the Court has discharged that duty, and, upon the face of the order, I must take it to have been positively decreed and decided that new trustees shall be appointed, and to have been positively decided that the legal estate in the fund belongs to the trustees when appointed; for the Court has pursued the inquiry and must be assumed to have done so in making the second order.

The right to require the bank to transfer cannot be resisted. I think no doubt can be thrown on the power which the Court or a Judge now possesses on the hearing of a matter to adjourn it into Chambers, and, having so adjourned it, to deal with it in Chambers upon what he has heard in Court. Undoubtedly the bank is quite safe in acting under the order of the Court.

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In my opinion, the right of the applicants to have the order which the Court has made performed cannot be resisted, and I therefore make an order on the *Bank of England* to act on the order in Chambers, in the terms of the notice of motion.

Marten:—I ask that the bank may be ordered to pay the costs of the motion.

Kekewich:—It is not usual in these cases to order the bank to pay the costs. The costs of all parties should come out of the trust fund, or be costs in the matter as was ordered by the Master of the Rolls in *Frodsham* v. *Frodsham* (1).

BACON, V.C.:—

The *Bank of England* are not to blame in this case. I think the bank, who have no interest in this matter except as custodians of the public money, ought not to be made to pay costs. I do not give them any costs, but the costs of the applicant will be costs in the matter of the petition.

G. I. F. C.

The *Bank of England* appealed, and the appeal was heard on the 21st of January, 1885.

Kekewich, Q.C., and *Latham*, for the appeal:—

We contend that there was no jurisdiction to make this order in Chambers in the way in which it was done, and that the matter ought to have been mentioned in Court again, or the petition should have been adjourned to Chambers. The *Trustee Act*, 1850, s. 32, gives power to appoint new trustees on petition. Sect. 33 gives the new trustees the same powers as if they were appointed in a suit. Sect. 34 gives power to make a vesting order. Sect. 35 deals with *choses in action*. Sect. 41 enables the Court to direct a reference and adjourn the hearing. Sect. 43 prescribes the mode of proceeding. The order must be made on the hearing of the cause or of any petition or motion, *i.e.*, a motion in Court.

[FRY, L.J.:—Is there any substantial distinction between adjourning the petition into Chambers and giving liberty to apply in Chambers, as was done here?]

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In *Frodsham* v. *Frodsham* (1) the Court had ordered the plaintiff and defendant to transfer a sum of stock into Court, and if the Rules of 1883, Order LV., r. 8, had been then in force the order might have been made in Chambers; but as the rules then stood it was held that the vesting order could not be made in Chambers. It was a strong case, for the making a vesting order was, under the circumstances, a formal matter involving no judicial discretion. Here there has not been any order for transfer, so the rule does not help the case. The statute 18 & 19 Vict. c. 134, s. 16, is a statutory declaration that orders under the *Trustee Act* cannot be made in Chambers except in cases provided for by general orders, and it was held in *Frodsham* v. *Frodsham* that as the general orders then in force did not meet the case the order could not be made in Chambers.

[BAGGALLAY, L.J.:—Here the proceedings were commenced by petition.]

The parties who bring an order to the bank to be acted on should bring a clean order shewing that the circumstances are such as to give the Court jurisdiction. Here is an order purporting merely to be made on an application in Chambers. An order to satisfy the terms of sect. 43 of the *Trustee Act* should be "at the hearing," or "on petition," or "on motion."

[BAGGALLAY, L.J.:—It appears on the face of the order that there was a petition.

FRY, L.J.:—It is clear on sect. 43 that the order may be made on motion in a matter commenced by petition. Does not the change of procedure by the *Judicature Acts* make a summons equivalent to a motion?]

Frodsham v. *Frodsham* answers that question.

[FRY, L.J.:—In that case there was no petition.]

There was something better, there was a decree to administer the trusts.

[FRY, L.J.:—The Act 15 & 16 Vict. c. 80, s. 26, authorizes the Judge to take in Chambers such matters as in his opinion can be more conveniently disposed of there.]

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That was relied upon by the Master of the Rolls in *Frodsham* v. *Frodsham* (1), but his decision was reversed.

[FRY, L.J.:—In that case the proceeding did not originate by petition.]

The only reported case of later date is *In re Moate's Trust* (2), but it is entirely different, and throws no light on the present question; there was there an adjournment to Chambers. The *Judicature Act* of 1884 (47 & 48 Vict. c. 61), s. 13, enables general orders to be made under the subsequent statutes. Order LV., rr. 1, 8, of the Rules of 1883, slightly varies the former rules, but does not help the present case. It is important to the bank to have the orders made in a clear form, so that they can safely act upon them, and it is material that they should be made on petition, so that the facts may be before the Judge in a regular form.

Marten, Q.C., and *Birrell*, for the Respondent.

[The Court observed that the order of the 22nd of July was irregular in directing that the right "may" vest, and in being made before the inquiry had been answered, and was otherwise objectionable in form, and asked whether the petitioner would object to having it put into proper form. They replied that she would not object to any alterations of form which the Court thought desirable, and were not further called on.]

FRY, L.J.:—

I have been asked by the Lords Justices to deliver the first judgment in this case, and I proceed therefore to do so.

The present appeal arises upon a petition presented in the matter of the trusts of the will of *Violet Tweedy*, and in the matter, of the *Trustee Act*, 1850, asking the appointment of new trustees, and a vesting order of certain stock of which the *Bank of England* are the custodians. Upon the hearing of that petition the Vice-Chancellor thought fit to order that two or more proper persons should be appointed trustees of the will of *Violet Tweedy* in substitution for the previous trustees. He thought fit

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further to order that an inquiry should be made of what the trust funds subject to the will of the testatrix consisted, and then he gave the parties liberty to apply at chambers for an order vesting the trust estate in the new trustees when appointed.

It appears to me, therefore, that the learned Vice-Chancellor came to three conclusions: first, that new trustees ought to be appointed; secondly, that an inquiry as to the trust funds ought to be made; and thirdly, that a vesting order ought to follow that inquiry. Upon an application subsequently made in Chambers on summons in this matter which had been begun by petition, the Judge was pleased to appoint certain gentlemen to be trustees, and to direct that the right to call for a transfer and to transfer into their own names certain sums of stock specified in the order might vest in the new trustees, and further to add that the right to sue for and recover the sums of stock might vest in the new trustees.

The *Bank of England* considered that that order was not one under which they could be called upon to act, and accordingly they refused to act upon it. Thereupon a motion was made before the Vice-Chancellor for an order requiring them to act upon it, and the Vice-Chancellor made an order in accordance with that application. From the last-mentioned order the present appeal is brought.

The broad proposition of the *Bank of England* is that no vesting order can be made upon a summons in Chambers. That question turns upon the statutes and the general orders of the Court. The first statute to be considered is the *Trustee Act*, 1850. The 35th section of that Act provides, "That it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust" in the persons who on the appointment shall be the trustees. Therefore it is plain that the Legislature contemplates the possibility of two orders being made in the matter. Then the 40th section enables the persons beneficially entitled to apply by petition. The 43rd section enacts that, "Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the Masters of

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the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act." It appears to me quite plain, that under the *Trustee Act*, 1850, it would be competent for the Court, on an appointment of new trustees, to permit the question of the vesting order to be brought before it upon a motion in the matter which originated in the petition.

The next statutory provision to which it is necessary to refer is the Act for the *Abolition of the Office of Master in Chancery* (15 & 16 Vict. c. 80). The 11th section provides that the Master of the Rolls and the Vice-Chancellor should sit in Chambers "for the despatch of such part of the business of the said Court as can, without detriment to the public advantage arising from the discussion of questions in open Court, be heard in chambers, according to the directions hereinafter in that behalf specified or referred to." It appears to me that the effect of that section was to introduce a totally new practice into the Court of Chancery, and to enable the Court to dispose in Chambers, if it thought fit, of matters which before that time must have been disposed of in some other method, and sect. 28 provides that the mode of proceeding in Chambers should be by summons. Amongst the methods for the disposal of business for which a summons was substituted, a motion appears to have been one. I think, therefore, that in cases in which there is nothing in such a course of procedure to conflict with the directions subsequently contained in the Act, it is competent for the Court to dispose in Chambers on summons of matters which previously to the passing of the Act had been disposed of by a Judge upon motion.

Then it becomes necessary to inquire what the directions subsequently contained in the Act are. The first enactment that it is necessary to refer to appears to me to be the 26th section. That section provides that the business to be disposed of by the Judges while sitting in Chambers shall consist of certain specified matters, "and such other matters as each such Judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor." That appears to me

to have enabled the individual judge in any particular matter properly brought before him, whether by cause or motion, or (where proceedings could be commenced by petition) by petition, to dispose of such particular matters, as he thought fit by a reference to Chambers. So far that works out the general provisions of the 11th section. Then the 27th section enables the Judge, when sitting in open Court, to adjourn for consideration in Chambers any matter which in his opinion may more conveniently be disposed of in Chambers. That again emphasizes the power of the Judge to select any particular matter from the business before him in Court, and direct the consideration of it to take place in Chambers.

The effect of these provisions appears to me to be to enable the Judge sitting in Court, where he had jurisdiction, by reason either of the institution of a cause, or by reason of the pendency before him of a matter which had been properly begun by petition, to select from the matters before him such particular matters as could be more conveniently disposed of in Chambers, and to mould his decree or order according to the view he might take of what it was desirable to dispose of in open Court, and what it was desirable to dispose of in Chambers. I think, therefore, that a Judge sitting to hear a petition presented under the *Trustee Act*, 1850, had under the sections to which I have referred power to select particular matters to be disposed of in Chambers.

Now what did the learned Judge in the present case do? He disposed in open Court of certain portions of the matters arising upon the petition. He found that it was a proper case in which to appoint trustees; but he thought that the question what particular persons should be trustees was one best disposed of in Chambers. In the next place he determined that an inquiry was proper as to what the trust funds subject to the will were, and he thought that such inquiry could best be disposed of in Chambers; he accordingly directed an inquiry in Chambers. He thought further that when that inquiry had been answered, it was desirable, or might be desirable, or necessary that a vesting order should be made. He thought that that was business that might properly be disposed of in Chambers. The mode in which he proposed to dispose of that in Chambers was by giving leave

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to any of the parties to apply by summons for a vesting order. That was business which the learned Judge saw fit to dispose of in Chambers, and accordingly he directed that it should be so disposed of, and in my opinion he had full jurisdiction to do so.

It appears to me that this conclusion is in no way inconsistent with or affected by the decision in *Frodsham* v. *Frodsham* (1). The present proceeding was begun by petition under the *Trustee Act* of 1850. It had therefore, its proper origination in the petition which the statute requires, and which I think it is very desirable to require, in order that the matters may in the first instance come before the Judge with the assistance of counsel. The Judge then may determine which of those matters are fit for decision in Court, and which of them are fit for decision in Chambers. The decision in *Frodsham* v. *Frodsham* proceeds upon this, that the sections of the *Master in Chancery Abolition Act* to which I have referred did not deal in any manner with the origination of the proceedings, but left them to be originated either by bill or by petition as matters then stood, and only dealt with the mode of disposing of the business when it was properly brought before the Court. The Act which dealt with and modified the origination of business was the *Despatch of Business Act*, 1855 (18 & 19 Vict. c. 134), the 16th section of which recited that "By divers Acts of Parliament the Court of Chancery is empowered to make orders in respect of the disposition of trust funds, and other matters under its jurisdiction, upon petition presented or motion made in a summary way, without bill, but such orders cannot be made in respect of the same matters upon application in Chambers," and went on to enact that the business to be disposed of in Chambers should comprise such of the matters in respect of which the Court was so empowered to make orders in a summary way, as the Lord Chancellor with certain advice might by a general order direct. The Lord Chancellor made a general order under the power so conferred upon him, but that order did not embrace proceedings for vesting orders under the *Trustee Act*, 1850. The result, therefore, of that enactment and the general order made under it is, that all matters which by previous statutes could be commenced by petition might still be

(1) 15 Ch. D. 317.

begun by petition, but that such of them as were embraced in the Lord Chancellor's order might be begun by summons, and the jurisdiction of the Court by bill still remained intact. Thus there were three modes of originating proceedings in the Court. Proceedings under the *Trustee Act* not having been brought by the General Order within the proceedings which might be originated in Chambers, it followed that they must be originated by petition as before the passing of that Act. I think, therefore, that the conclusion I have expressed in no way interferes with the decision in *Frodsham* v. *Frodsham* (1).

The view I take is this, that a matter under the *Trustee Act*, 1850, must originate by petition, and when so originated and heard in Court it is competent for the Judge who hears it to mould his order so as to direct the disposal in Chambers of such of the questions arising on that petition as he may think fit to be disposed of in Chambers.

The order in the present case is unfortunately not a very satisfactory document. It appears to me, and I believe I am expressing the opinion of my learned Brothers when I say, that it ought to have stated so much of the previous order as directed an inquiry as to the trust funds, and gave liberty to apply in Chambers for a vesting order, it should state the certificate which followed that inquiry, and then it should direct, not that the right to call for a transfer "may vest," but that it "do vest" in the trustees. If there is any other point of form which Mr. *Kekewich* suggests we shall listen to his suggestion with great attention.

BAGGALLAY, L.J.:—

The great experience which Lord Justice *Fry* has had as a Judge of the Chancery Division of the High Court, and in particular his acquaintance with the business transacted in chambers, as well as with that transacted in open Court, induced Lord Justice *Bowen* and myself to ask him to give judgment in the first instance in this case.

As I view it, the Judge, whether a Judge of first instance or a member of the Court of Appeal, has only to administer the law as

(1) 15 Ch. D. 317.

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he finds it, and ought not to be influenced by his view as to what the law should be. I am free to confess, that not only now but for years past, my sympathies have been very much in the direction of the views pressed upon us by Mr. *Kekewich*, but I do not think that those views can have effect given to them, having regard to the existing state of the law.

Lord Justice *Fry* has very carefully gone through the several Acts of Parliament by which matters of this kind are regulated. I entirely agree with him in the view he has taken as regards the actual technical effect of those Acts of Parliament. I think that it was within the jurisdiction of the learned Judge to do what he did, but I prefer to rest my judgment upon the following grounds: There is no appeal against the order of the 22nd of July, 1884. The present appeal is only against the subsequent order of November, which in effect ordered the *Bank of England* to act upon the terms of the previous order. Now, it appears that this matter was initiated by the order of the 28th of June, 1884, which was made upon a petition that raised the whole question. It was a petition by a person interested in the trust fund asking for the appointment of new trustees, and for an order vesting in those new trustees the funds subject to the trusts. The other parties interested were respondents. The trust funds, as I gather from the form of the order, were not then accurately ascertained. The grounds upon which the new trustees were sought to be appointed were, that one of the old trustees was out of the jurisdiction of the Court, and the other had become bankrupt. The order of the 28th of June, 1884, shews that the Judge decided that there was sufficient ground for the appointment of new trustees, and the order directed that new trustees should be appointed. That portion of the order could only be carried out by proceedings in Chambers to consider who were the proper persons to be so appointed, and those proceedings must have been initiated by summons. It went on to direct an inquiry as to what were the funds subject to the trusts, and then to direct that application might be made in Chambers for the vesting of those funds in the new trustees when they should be appointed. It appears to me that this was substantially adjourning the petition, as far as regards the

ultimate proceedings upon it, to Chambers. The giving liberty to apply in Chambers for a vesting order shews clearly that the Court was only acting under the jurisdiction it had by virtue of the petition. Having that jurisdiction by virtue of the petition, it directed, under the authority conferred upon it by the Act 15 & 16 Vict. c. 80, s. 27, that proceedings for obtaining a vesting order should be carried out in Chambers. It appears to me that what was done was substantially the adjournment of part of the subject matter of the petition for consideration in Chambers.

I entirely concur in what Lord Justice *Fry* has said as far as regards the undesirable form of the order of the 22nd of July, which must have been drawn up as it was *per incuriam*. I think, however, that if this order was modified in the way in which Lord Justice *Fry* has suggested the justice of the case would be entirely met, and every protection which the *Bank of England* could reasonably ask for would be afforded them. I entirely concur in the view of Lord Justice *Fry*, that when proceedings have once been initiated by petition it is within the jurisdiction of the Judge to direct the carrying out of the further proceedings in Chambers if he thinks the circumstances of the case require it.

BOWEN, L.J.:—

I think that in this case the bank was fully justified in objecting to the order in the form in which it was served. It seems to me to be of the greatest importance that the bank should insist upon strict compliance with the provisions of the Act, and I think that they ought not to be asked to accept doubtful orders which are not upon the face of them clearly within the meaning of the Act. They have a right to an order which shews that the provisions of the Act have been complied with, and I think that the order, as originally presented to them, did not shew that the provisions of the Act had been complied with so that they would have been justified in acting upon it. But treating the order as amended according to the suggestions of Lord Justice *Fry* and Lord Justice *Baggallay*, and dealing with it as an amended order, then comes the question whether that is a valid order under sect. 43 of the *Trustee Act*, 1850. Now, in order to be valid under that Act it must be an order made either upon the hearing of

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the cause, or of any petition or motion in the cause or matter. I do not doubt that the Court can either adjourn the hearing of the petition or the hearing of the motion which is made in Court to be finished in Chambers, and if this was a real adjournment of a petition or motion from Court into Chambers, and the order was framed so as to shew that it was so, there could be no question of the validity of the order. Moreover, Lord Justice *Fry* has pointed out that under the *Master in Chancery Abolition Act*, (15 & 16 Vict. c. 80), the Court has a right, so to speak, to select out of matters before it particular portions, and send those particular portions to be dealt with in Chambers. I cannot, after what has fallen from the Lord Justice *Fry* and the Lord Justice *Baggallay*, feel any doubt that the Court could in this case select out of the petition a certain portion to be transacted in Chambers, and amongst others this portion which deals with the vesting of the estate. I think it is sufficient to rest upon the ground which Lord Justice *Baggallay* has mentioned last. In substance this appears to me to have been an adjournment into Chambers of three different matters with which the petition dealt. First of all the appointment of trustees, and secondly an inquiry what the trust funds subject to the will of the testatrix were, and lastly, the dealing with the vesting. All those three matters were really adjourned for consideration in Chambers. The order of the 22nd of July ought to have stated the facts and the proceedings regularly, and as it has not done so I agree that it ought to be amended, and when amended as proposed by the Lords Justices I think it will be an order on which the *Bank of England* may safely act, though I think, as I have said already, that as matters stood they were amply justified in coming here.

It was then arranged for the matter to stand over for a week to ascertain whether the other parties beneficially interested would consent to the discharge of the order of the 22nd of July, that a new order might be substituted for it, the Court intimating that if such consent were not given the appeal would probably be simply allowed. The case was mentioned again on the 28th of

January, and an order was made the material parts of which were to the following effect:—

Discharge the order of the 28th of November, 1884.

The Petitioner and the other parties beneficially interested consenting, discharge the order of the 22nd of July, 1884, and let the Petitioner be at liberty to apply at Chambers for an order "wherein shall be recited so much of the order of the 28th of June, 1884, as ordered that two or more proper persons should be appointed trustees of the will of the testatrix, *V. Tweedy*, in substitution for *P. S. Lang*, who was out of the jurisdiction of the Court, and *W. H. Brydone*, who had been gazetted a bankrupt in *Scotland*, and as directed that an inquiry should be made of what the trust funds subject to the will of the testatrix, *V. Tweedy*, consisted, and that the parties were to be at liberty to apply at Chambers for an order to vest the trust estate in the new trustees when appointed; and wherein shall be also stated so much of the Chief Clerk's certificate as found of what the said trust funds consisted; and whereby, in pursuance of the said order dated the 28th of June, 1884, two or more proper persons may be appointed trustees of the said will in substitution for the said *P. S. Lang* and *W. H. Brydone*; and whereby it may be (*inter alia*) ordered that the right to call for a transfer of and to transfer into their own names the trust funds in the Chief Clerk's certificate mentioned do vest in the persons so appointed trustees of the said will."

Solicitors for the Bank: *Freshfields & Williams.*
Solicitors for Respondent: *Keeping & Co.*

H. C. J.

In re GILBERT.
GILBERT *v.* HUDLESTONE.

[1881 G. 1649.]

Practice—Appeal for Costs—Special Leave—Judicature Act, 1873, *s.* 49.

Where an appeal from an order as to costs which are left by law to the discretion of the Judge is brought by leave of the Judge under the 49th section of the *Judicature Act*, 1873, the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order unless there has been a disregard of principle or misapprehension of facts.

THE action in this case was brought for the administration of the estate of *Eliza Gilbert*, deceased.

On the 24th of July, 1883, Mr. Justice *Kay* made an order on further consideration, by which, among other things, he directed that the costs of the Plaintiff, except such costs as related to her

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claim for interest on certain dividends, should be taxed, and that the costs of the Defendants, so far as related to the Plaintiff's claim for such interest, be set off against the Plaintiff's costs so taxed, and that the Defendants pay the balance of such costs to the Plaintiff.

The Defendants applied in Chambers to the Judge to rehear the matter on the question of costs, and the summons having been adjourned into Court on the 13th of February, 1884, his Lordship was of opinion that he had no jurisdiction to rehear the matter, but gave special leave to the Defendants to appeal from his order as to the costs under sect. 49 of the *Judicature Act*, 1873.

The Defendants accordingly appealed from so much of the order as ordered them to pay the costs of the action.

Hastings, Q.C., and *Laing*, appeared for the Appellants, stated the material facts and questions in dispute in the action, and contended that the discretion of the Judge was not properly exercised in making the Defendants pay the costs of the action.

W. Pearson, Q.C., and *F. Watson*, for the Plaintiff, were not called on.

BAGGALLAY, L.J. :—

During my experience as a Judge of the Court of Appeal I have no recollection of any similar appeal to this. No doubt power is conferred on any Judge by sect. 49 of the *Judicature Act*, 1873, to give leave to a party to appeal on a question of costs which by law are left to the discretion of the Court. There is no question that in the present case the costs were properly a matter for the discretion of the Court, but the Judge has given leave to appeal in accordance with the section referred to. We have, therefore, to say whether effect can be given to that appeal. [His Lordship then referred to the facts of the case and continued :—]

Under these circumstances I am of opinion that the order of the learned Judge was right, and that this appeal must be dismissed. I wish, however, to make this further observation. As

I said before, this is the first time that an appeal for costs, where leave has been given under sect. 49, has been brought before me; but, according to my present view, when the Court of Appeal is acting under that section it must still recognise the discretion of the Judge, as in other matters which are left to his discretion. If there has been any violation of principle or misapprehension of facts this Court will interfere, but not otherwise. I think this applies to a question of costs within the discretion of the Judge as to other questions.

BOWEN, L.J.:—

I entirely agree with the opinion of Lord Justice *Baggallay* as to the merits in this case. With respect to sect. 49, I also agree with him that even when leave has been given to appeal on a question of costs we must nevertheless have regard to the discretion of the Judge, and overrule his decision only if there has been some manifest disregard of principle or misapprehension of facts. I think our duty is made clear by comparing sect. 19 with sect. 49 of the *Judicature Act*, 1873. By the 19th section power is given to the Court of Appeal to hear appeals except in certain cases, and by the 49th section questions of costs which are left to the discretion of the Court are made an exception. Therefore the Court has no power to hear the appeal, unless leave be given by the Judge who makes the order; but even if he does give leave, the order he has made as to costs is not the less a discretionary order, and must be treated as the order of a Judge who has better means of knowing the circumstances than the Court of Appeal can have.

FRY, L.J.:—

I am of the same opinion. I have nothing to add, but to express my entire concurrence in all that has been said by the other Lords Justices.

Solicitors: *Mackreth, Bramall, & White*; *Watson, Sons, & Room.*

M. W.

C. A.
1885
Feb. 12, 13;
March 7.

In re POLLOCK.
POLLOCK *v.* WORRALL.

[1884 P. 100.]

Will—Legacy—Ademption—Moral Obligation other than Parental.

The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the will, though without reference to any special application of the money.

A testatrix by her will bequeathed to a niece of her deceased husband £500 with these words, "according to the wish of my late beloved husband," and she afterwards in her lifetime paid £300 to such legatee, with a contemporaneous entry in her diary that such payment was a "legacy from" the legatee's "uncle *John*":—

Held, that the presumption was that such legacy was adeemed to the extent of £300, and that such presumption of ademption *pro tanto* only was not displaced by evidence that more than a year before the £300 was given the testatrix had said, that the legatee when then asked by the testatrix whether she would rather receive £300 down than a larger sum after the testatrix's death, had replied that she would prefer the £300 down.

THE question in this case was whether a legacy of £500 bequeathed to the Appellant, Miss *Julia Louisa Pollock*, by the will of *Frances Pollock*, since deceased, had been adeemed wholly or in part by a gift of £300. It appeared that *John Pollock*, the late husband of the testatrix, had left by his will the whole of his residuary estate to his widow, the testatrix, absolutely; but there was evidence that he had verbally expressed a wish that his niece, the present Appellant, should have some gift after the death of the testatrix. The testatrix, by her will, dated the 24th of October, 1874, appointed the present Respondents, her two brothers, executors, and, *inter alia*, bequeathed to *Julia Louisa Pollock* (the Appellant), "the sum of £500 sterling, according to the wish of my late beloved husband."

It appeared from the affidavits of the Respondents that in June, 1880, the testatrix told them that she had asked Miss *Pollock*, the Appellant, if she would rather receive £300 down instead of a larger sum after her, the testatrix's, death, and that Miss *Pollock* had answered by a letter stating that she would prefer the £300

down. No such letter, however, was forthcoming, and the Appellant denied remembering that she had written any such letter.

Early in July, 1881, the testatrix sold out some stock, and with the proceeds sent £300 by cheque to the Appellant at *Plymouth*.

The testatrix kept in her own handwriting a diary which contained, *inter alia*, the following entries relating to the £300:—

"Saturday, 2 July, 1881.—I wrote to ask *Julia Pollock* where the legacy was to be paid."

"July 1881, Tuesday 5.—Letter from *Julia* telling where to send the cheque."

"Friday 8.—Wrote to *Julia P.* telling her that £300 had been paid at the branch bank at *Plymouth* for her, being a legacy from her uncle *John*."

"Wednesday 13.—Letter from *Julia* saying she had received the legacy without any difficulty."

The Appellant's account of what had occurred was that in July, 1881, she had received a letter from the testatrix stating that she, the testatrix, wished to give her £300, in order that she might purchase a clock or inkstand as a *souvenir* of her uncle *John*, and that she had accordingly purchased a clock out of the £300, and had written to the testatrix informing her of this and consulting her as to the inscription to be put on the clock, and this was supported by the following entry in the testatrix's diary:—

"1881, December, Tuesday 13.—Letter from *Julia P.* telling me she had got the clock and was waiting for the inscription."

The testatrix died on the 27th of February, 1883.

The executors having refused to pay the legacy of £500 to the Appellant, a summons was taken out on her behalf for its payment, and such summons being adjourned to the Court, came before Mr. Justice *Pearson*, who, after hearing the case, declared that the legacy of £500 had been adeemed by the gift of £300 in the lifetime of the testatrix.

The Appellant appealed.

H. W. Horne, for the Appellant:—

There is no evidence of what was the wish of the testatrix's husband, and there is no particular purpose expressed in the will

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for which the legacy was given within the meaning of the rule as to ademption by a subsequent gift, where, as here, the testatrix does not stand in the relation of a parent to the legatee: *Debeze* v. *Mann* (1); *Roper* on Legacies (2); *Pankhurst* v. *Howell* (3). It is therefore necessary for the executors to prove that the legatee agreed to accept the £300 in satisfaction of the legacy of £500. The evidence of the conversations between the testatrix and her brothers, the executors, is not admissible; it is not a declaration made by the testatrix at the time of the gift, nor is it part of the transaction so as to be admissible according to the decision in *Kirk* v. *Eddowes* (4).

[EARL OF SELBORNE, L.C.:—Was the question whether there had been an ademption *pro tanto* of the legacy argued before Mr. Justice *Pearson*?]

No; it was assumed that if there were an ademption at all, it was an ademption of the whole legacy. The gift of the £300 could not be the fulfilment of a purpose to bequeath £500, and if the purpose was not the same, or was not completely fulfilled, there was no ademption: *Roome* v. *Roome* (5). At all events the ademption was only a partial one.

C. Browne, for the Respondents:—

Except where a testator has said that the gift or advance was in part satisfaction of the legacy, as in *Kirk* v. *Eddowes*, it has been taken that such gift or advance was a satisfaction of the whole legacy. The gift here was for the same purpose as the legacy, and therefore the presumption is that it was given to satisfy it. There was evidence that the testatrix's husband wished that his niece, the Appellant, should have some gift after the death of the testatrix, so that the gift fulfilled that intention: *Debeze* v. *Mann* (6); *Trimmer* v. *Bayne* (7).

EARL OF SELBORNE, L.C.:—

By will dated the 24th of October, 1874, *Frances Pollock* bequeathed to the Appellant *Julia Louisa Pollock*, a niece of her

(1) 2 Bro. C. C. 165, 166.
(2) 4th Ed. vol. i. p. 393.
(3) Law Rep. 6 Ch. 136.
(4) 3 Hare, 509.
(5) 3 Atk. 181.
(6) 2 Bro. C. C. 165, 519.
(7) 7 Ves. 508, 515.

deceased husband, *John H. Pollock*, the sum of £500, adding to the terms of the gift these words, "according to the wish of my late beloved husband." In July, 1881, she sold out some stock to which she was entitled, and out of the proceeds thereof paid to the Appellant the sum of £300, making contemporaneous entries relative to such payments in a diary which she kept, in one of which it was described as "the legacy," and in another as "being a legacy from her" (the Appellant's) "uncle *John*." There is also evidence of some conversations of the testatrix bearing on this subject with her two brothers (whom she appointed her executors) in June, 1880, and afterwards; the import and weight of which, if admissible, I will afterwards consider. I prefer in the first instance to consider the case as it would have stood if there had been no such conversations. The question is, whether the legacy of £500 was adeemed or satisfied wholly or in part by the donation of £300? Mr. Justice *Pearson*, by the order appealed from, has declared that it was adeemed by the gift and acceptance by the Plaintiff of that sum. The question whether it was adeemed *pro tanto* only, does not appear to have been argued before him, it seems rather to have been assumed that if adeemed at all, it must have been adeemed altogether. When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts, of a kind not in this case material) there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or an "ademption" of the legacy. This presumption has in some cases of that class (see particularly *Hopwood* v. *Hopwood* (1)), been carried to a great length. It was at one time thought, that the ademption in such a case would be (*primâ facie*) total, although the amount of the subsequent advancement might be less than that of the legacy. But in *Pym* v. *Lockyer* (2), in which the whole doctrine was carefully examined and explained

(1) 7 H. L. C. 728.

(2) 5 My. & Cr. 29.

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by Lord *Cottenham*, that learned Judge corrected this error, and the rule established by *Pym* v. *Lockyer* (1) is, that when the donor is a parent, or *in loco parentis*, and when the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto*.

The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised *primâ facie* in favour of ademption. And it is clear from the authorities, that evidence of the circumstances under which the subsequent gift was made including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. And it appears to me that a case of this kind comes very near, in principle, to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended.

In the present case, the purpose of fulfilling the moral obligation recognised by the testatrix as imposed upon her by the

(1) 5 My. & Cr. 29.

communication of the wishes of her late husband (who had left her his whole property) appears clearly enough on the face of the will; and the evidence proves, that the subsequent gift was for the same purpose; for she calls it in the contemporaneous entries in her diary "a legacy from" the Appellant's "uncle *John*" —that is from her husband. By this she could not mean anything different; because her husband had not, in fact, given the Appellant any legacy except by expressing the wish to which the will refers. I agree with Mr. Justice *Pearson* that this is a case of ademption; whether of total ademption or *pro tanto* only, remains to be considered. The case being like those in which the parental relation exists, so far as the purpose of both gifts is the fulfilment of an antecedent moral obligation without reference to any special use or application of the money, the principle of Lord *Cottenham's* decision in *Pym* v. *Lockyer* (1), seems to me to be *primâ facie* applicable; and, if so, the burden of proof is on those who contend for total ademption. The testatrix has by her will shewn that, when she made it she thought that a gift of £500 was not more than enough for the due fulfilment of her acknowledged moral obligation. That measure of her purpose is not *primâ facie* displaced by the mere subsequent advancement of £300, nor by her calling it a "legacy" from her husband, which expression might be substantially appropriate in the sense in which she used it, though the £300 might not exhaust the whole bounty intended to come from the same source to the legatee. There are, however, those conversations which the testatrix had with her brothers in June, 1880, and afterwards, and which, though not contemporaneous with the gift, are so connected with the matter as to make them in my judgment admissible in evidence to shew what at the time referred to in the conversations was the intention of the testatrix though, as against the Appellant, not evidence that the communications stated to have passed between her and the testatrix in fact took place. It appears that in June, 1880, the testatrix told her two brothers that she had asked the Appellant (referring to her husband's expressed wish that she should give her some-

(1) 5 My. & Cr. 29.

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thing), whether she would rather "receive £300 down" (or "at once") than a larger sum after her (the testatrix's) death, and that the Appellant wrote to say she would prefer it. To one of her brothers the testatrix afterwards, at times not definitely fixed, said more to the same effect. It is not without some degree of doubt that I have come to the conclusion, that, although the sum given in July, 1881, is the same which in June, 1880, the testatrix contemplated giving in lieu of the £500 (which would then have been total ademption) the lapse of more than a year without the fulfilment of that intention is enough to prevent any satisfactory inference that the gift made in July, 1881, was intended to be a total ademption of the legacy of £500. The idea of the testatrix in June, 1880, was to pay down the lesser sum at once, and to do this, not without, but with, the Appellant's consent to take it in lieu of the larger amount. It cannot be said to have been the same thing to the Appellant whether the £300 was paid in June, 1880, or more than a year afterwards, when the testatrix (a lady whom I suppose to have been advanced in years) would be so much nearer to the end of her life. The interval between the gift and her death exceeded in point of fact, but by six months only, that between the conversations in June, 1880, and the gift. There is no trace of any further communications between the testatrix and the legatee before July, 1881, and the entries in the diary, which were actually contemporaneous with the gift, do not refer to any such intention as that the lesser sum was to be paid and accepted in lieu of the greater, unless, indeed, this ought to be inferred from the mere use of the words "the legacy" and "being a legacy from her uncle *John*," which I do not think. My conclusion is that the presumption in favour of an ademption *pro tanto* only is not sufficiently displaced by this evidence, and therefore that the order of Mr. Justice *Pearson* ought to be varied, by declaring that the legacy of £500 was adeemed by the gift to the extent of £300 only, and by ordering payment of the difference (£200) to the Appellant with interest from the expiration of one year after the testatrix's death. As the Appellant will, in that view, partially succeed and partially fail, I think there should be no costs of the appeal, but that the

costs of the application to Mr. Justice *Pearson* should be paid out of the estate.

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BRETT, M.R.:—I agree with the inference of fact drawn in this case.

COTTON, L.J., concurred.

Solicitors for Plaintiff: *Pollock & Co.*
Solicitors for Defendants: *Heales & Son.*

W. P.

In re ALLIANCE SOCIETY.

C. A. 1883 KAY, J. *June*, 22, 23. C. A. 1885 *Jan.* 13.

Winding-up—Withdrawal of Members—Mutual Loan Society—Payment out of Special Fund—Applicability of Rules to Winding-up.

The rules of an unlimited mutual loan society provided that a separate fund should be formed by the subscriptions of members joining in each year, which subscriptions might, with the consent of the directors, be paid in advance. The accounts of each fund were to be kept distinct, and the members were to receive advances called "appropriations," out of the accumulations of the particular fund to which they subscribed. The appropriations were to be repaid by instalments extending over twenty years. Members might withdraw on giving notice, and were in that case entitled to a return of their subscriptions, together with payment of the bonuses declared in respect of their shares, such payments to be made in the order of the dates of their notices, and only out of moneys received after the date of their notices in repayment of appropriations.

When appropriations had been made to all members of a fund, or before that under certain circumstances, the fund was to be declared closed and the accumulations were to be divided among the continuing members of the fund.

The company was wound up voluntarily, and the liquidator applied for the direction of the Court as to the distribution of the assets among the members, there being no outside creditors.

There were four classes of members whose interests were in dispute:—

1. Members who had given notice of withdrawal before the closing of their funds, and before the commencement of the winding-up.

2. Members who had given notice of withdrawal after the closing of their funds, but before the commencement of the winding-up.

3. Continuing members who had paid subscriptions in advance.

4. Continuing members who had not paid any subscriptions in advance.

Held, by *Kay*, J., that the provision for the repayment of withdrawing

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members out of the particular fund ceased to apply on the winding-up of the company, and that those members who had given notice of withdrawal before the commencement of the winding-up had no priority over the continuing members :—

Held, also, that the continuing members who had paid their subscriptions in advance had no priority over the other members :—

But, *held*, by the Court of Appeal, that, according to the true construction of the articles, members who had given notice of withdrawal before the closing of their fund and before the commencement of the winding-up had a charge on the repayments of appropriations belonging to their particular funds ; that such charge did not cease on the closing of the fund or on the winding-up, and that they were therefore entitled to be paid in full out of such repayments in priority to all other members.

In re Blackburn and District Benefit Building Society (1) followed.

In re Mutual Society (2) distinguished.

THIS was an appeal from a decision of Mr. Justice *Kay*, made in the winding-up of the *Alliance Society*.

The society was a mutual loan society and was registered as an unlimited company under the *Companies Act*, 1862. The objects were to accumulate capital by monthly and other subscriptions from members, and to advance sums out of such capital to members who required them.

The memorandum and articles of association were registered on the 16th of November, 1872 ; but some of the articles were altered by a special resolution passed on the 24th of March, 1881, and duly confirmed.

There were two classes of members, appropriation members and bonus members. Appropriation or advanced members paid a subscription of 5*s.* per month on each appropriation certificate, which entitled the holder to an appropriation or advance on each certificate without interest by drawing, or by tender of a premium, should the member desire the advance before he obtained it by drawing. The subscriptions paid on appropriation certificates entitled the holders to interest at the rate of 5 per cent. per annum up to the date of appropriation, and each contributor, so long as the subscriptions were paid and the nominee, who was named on granting each certificate, lived, was entitled to share in certain tontine bonus allotments.

Bonus members paid a subscription of 2*s.* 6*d.* per month on

(1) 24 Ch. D. 421; 10 App. Cas. 33.

(2) 24 Ch. D. 425, n.

each bonus certificate, entitling the holder to interest at 5 per cent. per annum on all subscriptions paid, and (as long as the nominees lived) to shares in the tontine allotments; but they were not entitled to appropriations.

The directors were permitted to receive subscriptions in advance and to allow discount on them (Art. 48).

Every year a separate fund was formed by the members joining the society in that year. The accounts of each year were kept distinct, and members received their appropriation out of the accumulations of the particular fund to which they subscribed.

The rules as to repayment of appropriations, the withdrawal of members, and the closing of the funds, and distribution of the accumulations among the members were as follows:—

"*Repayment of Appropriations.*

"Art. 44. All appropriations and premiums shall be repaid by equal quarterly instalments, extending over a period of twenty years from the completion of the advance; the first instalment being due on the usual quarter-day next succeeding the date of such completion.

"*Deaths and Withdrawals.*

"Art. 52. Upon the decease of any member, his executors or administrators alone shall (subject to the provisions herein contained) be entitled to have their names placed on the register of members in respect of the certificates of such deceased member, in lieu of the name of each deceased member.

"Art. 53. In the event of the death of a nominee, all benefits in virtue of the certificates held upon the life of such nominee shall cease, and the total amount of all subscriptions which shall have been paid upon every unappropriated certificate held upon his or her life, shall be returned (together with any interest due) to the registered holder or holders thereof, subject to the provisions of article 54, as to withdrawal fee and moneys available for withdrawals.

"Art. 54. Any member, who, after the expiration of three calendar months from his entry, may wish to withdraw from the society, and the legal personal representatives of any member who shall have died, shall be entitled, after leaving a notice in writing

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at the registered office of the society, to have the total amount of the subscriptions which shall have been paid upon each unappropriated certificate held by such withdrawing or deceased member, returned to him or them (together with any interest due at the date of the notice), and also, upon satisfactory proof being adduced to the directors of the good health of the nominee upon whose life such unappropriated certificate is held, shall, in addition, be entitled to receive the then present cash value of any bonus or bonuses which may have been awarded in respect thereof; a withdrawal fee in the case of bonus certificates of 2*s.* 6*d.* each certificate, and in the case of appropriation certificates of 10*s.* each, being first deducted in addition to all fines and fees which may be due: Provided, nevertheless, that such payments shall only be made in the order of the date of the receipt of the notices, and only out of the moneys received by the society from time to time after the receipt of the notice in repayment of appropriations and premiums to the credit of the particular fund from which such withdrawal takes place. In the event of a member giving a notice in writing of his inability to produce evidence as to the state of health of his nominee, the directors shall be at liberty to pay him the value of his tontine bonus or bonuses six months after receipt of such notice, on proof of the nominee being still alive.

"*Closing of Funds.*

"Art. 55. As soon as the requisite advance has been made on every subsisting appropriation certificate issued in any fund, all subscriptions on certificates in such fund shall cease, and the fund shall be declared to be closed, except for the purpose of distributing moneys receivable by the society in respect of such fund, as provided by article 56.

"Art. 55a. (Passed on the 24th of March, 1881.) The directors nevertheless shall have power to declare any fund to be closed either with the sanction in writing of the holders of two-thirds of the certificates then remaining entitled to receive appropriations, or in the event of no tenders (in order in accordance with the regulations for appropriations for the time being in force) being made at any two consecutive appropriation meetings of the fund,

and such closing in either case shall have the same effect as if the fund had been closed under article 55.

"Art. 56. All instalments of appropriations and premiums, and other moneys (if any) which shall thereafter be received in respect of such fund shall, subject to payment of all expenses in reference to such fund, be distributed in dividends at such times as the directors may determine, amongst the registered holders of such certificates (issued in respect of such fund) as shall be valid and subsisting at the time of such distribution and continue to be entitled thereto; in the first place, in repayment, in equitable proportion, of subscriptions standing to the credit of each member of such fund; and, in the next place, in payment of tontine bonuses in like manner. The dividends so distributable shall be applied in discharge of the ultimate repayments of any members who may then be indebted to the society in respect of such fund (so as to shorten the term of his mortgage), together with such discount as he may be entitled to under article 48."

On the 31st of December, 1880, one fund, known as "Fund A," was closed, and on the 31st of December, 1882, the remaining funds were also closed.

The society carried on business until the 1st of March, 1883, but finding that it could not get funds in with sufficient rapidity to pay out withdrawing members, who began to get numerous, and at the same time do new business, an extraordinary general meeting of the continuing members was held on that date, when it was resolved, amongst other things, that the society should be wound up voluntarily, and that the secretary, *E. T. R. Wilde* should be the liquidator. These resolutions were duly confirmed at an extraordinary general meeting of the members, held on the 19th of March, 1883.

At the date of the resolution of the 1st of March, 1883, there were holders of both bonus certificates and appropriation certificates upon which no advance had been made, who had given notice of withdrawal, some before Fund A was closed, and some after; but all of whom were partially or wholly unpaid. There were also continuing members—both holders of tontine bonus certificates and of appropriation certificates.

Repayments on account of appropriations had been received by

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the liquidator from time to time since the date of the resolution to wind up, and considerable sums were receivable as the remaining instalments became due, but it was believed that the total amount would be insufficient for the payment of every certificate holder in full. Questions had therefore been raised by holders of certificates, who gave notice of withdrawal before the closing of Fund A and the alteration of the articles, and those who gave notice afterwards, and also by holders of certificates upon which subscriptions had been paid in advance, and by the continuing members (being members who had not given notice of withdrawal nor paid subscriptions in advance) as to the mode in which the assets of the society ought to be distributed, having regard to the rights and interests of the several holders of certificates.

A petition was now presented by the liquidator, asking that the rights of the several parties interested in the society might be adjudicated upon, and for directions as to the manner in which its assets ought to be applied.

Mr. *Hugh C. Godfray* was the holder of thirty-five appropriation certificates and twenty bonus certificates, and gave notice of withdrawal on the 17th of December, 1880. He was selected to represent the holders of certificates (whether appropriation or bonus) who gave notice of withdrawal before the closing of Fund A and as to the other funds before the alteration in the articles of association by which article 55a was introduced.

Other classes of certificate holders were represented by other Respondents.

The petition came on for hearing before Mr. Justice *Kay* on the 22nd of June, 1883.

Hastings, Q.C., and *William King*, for the petitioner, said that the petition was presented under the 138th section of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), for the purpose of obtaining the direction of the Court as to the rights of the several parties interested in the assets of the society, and also how the assets should be distributed.

Rigby, Q.C., and *A. W. Rowden*, for *Godfray*, submitted that members of the society who gave notice of withdrawal before the closing of their funds, were, on the construction of the articles of

association, entitled to be paid in priority to all the other members; article 54 having placed a member who wished to withdraw, and gave notice thereof, on the same footing as the legal personal representative of a deceased member. Withdrawing members had a preference in every sense. They referred to the cases of *In re Queen's Benefit Building Society* (1); *In re Norwich and Norfolk Provident Permanent Benefit Building Society* (2), and Mr. Justice *Kay* referred to the case of *Law* v. *London Indisputable Life Policy Company* (3).

E. A. Geare, for members who gave notice of withdrawal after the closing of Fund A, contended that all the members who gave such a notice, whether before or after the closing of the fund, were entitled to be paid *pari passu*, as all had become creditors together. They were entitled to priority over the continuing members. He referred to the case of *Griffith* v. *Paget* (4).

Northmore Lawrence, for continuing members of the society, submitted that they were in the same position as the withdrawing members. The article which gave members withdrawing priority when the society was a going concern, and not after it went into liquidation (article 55a), gave power to close the fund, and when that was done, at any time, article 56 provided for equal distribution of the assets, and overrode article 54. There was no power to withdraw after the closing of the fund, and clause 1 of the 133rd section of the *Companies Act*, 1862, enacted that in a voluntary winding-up "the property of the company shall be applied in satisfaction of its liabilities *pari passu*" . . . . The withdrawing members were none the less shareholders though they had given notice, and after the closing of the fund no member had a right to withdraw. The assets should be divided amongst all the members in proportion to their subscriptions. He referred to the cases of *Brown* v. *Dale* (5), *Ex parte Maude* (6), *In re Scinde, Punjaub, and Delhi Corporation* (7), and *In re Eclipse Gold Mining Company* (8), and on the question of the costs of the winding-up to the 144th section of the *Companies Act*, 1862.

(1) Law Rep. 6 Ch. 815.
(2) W. N. 1876, 186, 230.
(3) 1 K. & J. 223.
(4) 6 Ch. D. 511.
(5) 9 Ch. D. 78.
(6) Law Rep. 6 Ch. 51.
(7) Ibid. 53, n.
(8) Law Rep. 17 Eq. 490.

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Temple Cooke, for members who had paid their subscriptions in advance, submitted that they came within the decisions referred to on behalf of the continuing members, and that in the distribution of the assets regard should be had to those subscriptions.

Rigby, in reply.

KAY, J.:—

In this case of a society which seems to be a kind of benefit society, there has been a voluntary winding-up, and this is a petition by the liquidator under the 138th section of the *Companies Act*, 1862, asking for the direction of the Court as to the distribution of the assets. Clause 1 of the section enacts that "the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Before I deal with the facts of the case, I will refer to the principles of law which have been laid down clearly and distinctly by a great authority, Lord *Selborne*, and to the comments made by his Lordship on the section in the case of *Black & Co.* (1). In considering the question whether there could be a set-off in the winding-up of a company under the section, his Lordship was of opinion that (2) "the moment that the winding-up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and, in the first instance, to payment *pari passu*. The different sections of the Act—those which define the liability of limited companies—the 7th, 8th, 23rd, and 38th—those which deal with the administration of assets, the 98th, 101st, and 133rd—those which give the power to make calls, not in the ordinary way, but specially for the purposes of the Act, the 102nd and 133rd—all have in view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be

(1) Law Rep. 8 Ch. 254–262. (2) Law Rep. 8 Ch. 262.

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to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear on the subject."

Then there is another case, which also bears very much upon the meaning and proper construction of the articles of this society, and which I have to consider, and it is the well-known case of *Re State Fire Insurance Company* (1) where, there being an insurance company in the course of being wound up, the policies of which contained provisions that the stock and funds of the company should be alone liable, and that no member should be individually liable, it was held that those provisions did not give the assured a charge upon the funds of the company so as to entitle them to any priority as between themselves, or as against the general creditors. The cases of *Law* v. *London Indisputable Life Policy Company* (2) and *Re Athenæum Life Assurance Society* (3) were referred to, and the words used in those cases, which would seem *primâ facie* to intimate that there might be a charge, were considered to have been incautiously used, and it was held that nothing which amounted to a charge was effected by words of that kind. In the case before me there are no outside creditors of the society. The persons who are claiming are either members or have been members, in case it should be held that they have now ceased to be members; and there are four classes, viz., those who gave notice of withdrawal before the closing of the "Fund" known as "A," to which they subscribed; those who gave notice of withdrawal after the closing of that fund, but before the winding-up commenced; those who have given no such notice, but who have paid their subscriptions in advance; and those who have neither given notice nor paid anything in advance.

The contention has been that the persons who gave notice of withdrawal have, for the moneys which thereupon became payable to them from the society, a preference or priority as against the other classes, or some of them, and that was founded on the articles which I am now going to consider. I may state generally

(1) 1 H. & M. 457; 1 D. J. & S. 634. (2) 1 K. & J. 223.
(3) Joh. 633.

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that the scheme of the society was this: The members paid subscriptions to a particular fund, and out of that fund the subscribers were entitled to get, what are called "appropriations," and in order to obtain their appropriations they were in some cases bound to pay a certain premium. Then the appropriations were to be repaid. They were, in point of fact, advances which the members were liable to repay. That being the nature of the society, I will refer to the articles which are material for the present purpose. It was provided by article 44 [His Lordship read it and continued:] That means that a member who obtains an advance, called an appropriation, and has to pay a premium for it, shall repay the advance and the premium by means of those instalments. Then there are certain fines provided for, which I need not refer to. Then there comes a group of clauses, headed "Deaths and withdrawal:" [His Lordship read article 52, and continued:] The persons may either become members themselves, or they may insist upon having such claim as the deceased member might have against the society, without becoming formally themselves members. Article 53: [His Lordship read the article, and continued:—] Then comes article 54, upon which most of the argument has turned, and it provides that: [His Lordship read it, and continued:—] The argument was that the object of that clause was obviously, that a member who wished to withdraw should be in the same position as the legal personal representative of a deceased member, and therefore a member who wishes to withdraw ceases to be a member. The words, "to have the total amount of the subscriptions which shall have been paid upon each unappropriated certificate held by such withdrawing or deceased member returned to him or them, together with interest due at the date of the notice," of course do not mean that his particular subscriptions have been set apart, and are to be held as a separate fund, and are to be returned in specie. No such thing is provided. "Returned" simply means "to have that amount paid to him." The question which I have first of all to consider is: Do the words of this article give a charge, or anything in the nature of a charge? That is the reason why I referred to the case of *Re State Fire Insurance Company* (1). There

(1) 1 H. & M. 457; 1 D. J. & S. 634.

the words as to the policies are entirely analogous, that a certain fund should alone be liable. Not that the fund "shall be liable," but that "it shall alone be liable." That is, that you shall not have recourse to any other part of the assets of the society for the payment of the sum which becomes due on withdrawal; but that the fund, which shall alone be liable, shall be the money afterwards received in repayment of appropriations and premiums. Therefore, I cannot think that the words do give, or were intended to give, anything in the nature of a charge. I must observe that the claimant who now makes this claim is bound to shew clear words in the articles giving him the charge, if that is the nature of the claim; but I think in the argument it was not ventured to put the case so high as that. It was hardly said that he was entitled to any charge, or lien, or equity, on the particular fund. But it was argued that, out of the fund, somehow or another, he was to have a priority of payment as against any other person or persons who were entitled to payments out of the fund. It is, however, merely following the most ordinary rule of construction, which anyone's common sense would suggest—if it had not been very much insisted upon in legal decisions—that we must not only look at the very words which we have got to construe in the instrument, but must look at the context. The next article is 55, and that is the beginning of a group headed "Closing of Funds." [His Lordship read the article, and continued:—] It seems to me impossible to deny that the repayment of appropriations and premiums would be "moneys receivable by the society in respect of such fund." There is interposed, by a subsequent resolution, an article numbered 55a, and which is in these words: [His Lordship read it, and continued:—] That is a matter of detail, as to the mode of closing the fund, which does not very much bear upon what I have to decide. But now comes a very important article indeed, viz., 56. I pause to look at those which I have read before. The fund out of which the withdrawing member is to be paid is "moneys received by the society . . . . in repayment of appropriations and premiums." Then article 56 says: [His Lordship read it, and continued:—] Now, if it be true that, by article 54, a member who has given notice of withdrawal has a right to priority of payment, as against the other

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claimants, out of the moneys to be received in respect of appropriations and premiums, he would have a right to priority of payment as against moneys to be received in respect of appropriations and premiums, as well after the closing of the fund as before. But there is a clause which says expressly that, after the closing of the fund all moneys received in respect of appropriations and premiums are to be distributed in dividends. It may still be that, as to the dividend payable to him, he may have a right to priority of payment, and, if the matter stopped there, there might be some ambiguity; it does not stop there, but goes on to say that they are to be distributed in dividends, "in the first place, in repayment, in equitable proportions, of subscriptions standing to the credit of each member of such fund." "Each member" means every member, and every member means a member who has got a certificate, whether he has or has not given notice to withdraw; and here I find a provision, which, as to appropriations and premiums received after the closing of the fund, is directly contrary to that which it was argued is the meaning of article 54, in respect of a withdrawing member. A withdrawing member is a person who, to use the very words of article 56, is a registered holder of a certificate, and the thing to be paid to him is the subscriptions standing to his credit, and which, according to article 54, are to be returned to him. My opinion is, that this is not a contradiction of article 54, but that the articles are to be read so as to make them all consistent with each other; and accordingly the proposition that article 54 meant to give a preference to a member, who had given notice to withdraw, is not pursuant to the meaning of the articles when we read them altogether. Reading all the articles together, I come to the conclusion that it was not intended that, on dissolution and winding-up of the society, or upon a distribution of one of the funds, a withdrawing member should have any preference or priority of payment over a non-withdrawing or any other member who is entitled to have his subscriptions repaid to him, but that article 54—so far as it seems to be an advantage—merely means that, while this is a going concern, the member who wishes to withdraw shall have no claim whatever except to be repaid out of the appropriations and premiums that may have

been received by the society in respect of that particular fund to which he subscribed, and from which he has withdrawn. That is the only fund ("only" being the emphatic word) out of which he is to be paid, and in paying him out of that fund, the only mode in which he is to be paid is in the order of his notice to withdraw. But that may be very well when the society is perfectly solvent, and when there is ample to pay him as well as everybody else. If, however, the fund has to be distributed, if it come to an end, and *à fortiori* if the society be wound up and there has to be a distribution of the fund amongst the members, then there is nothing in any of the articles to give to a withdrawing member any kind of priority over a non-withdrawing member. That is almost enough to determine the case: but it has been pressed upon me that a withdrawing member is, in fact, not a member at all, but that he is a creditor from the time he gives notice to withdraw. That argument could not be put so high as to say that he would rank *pari passu* with the outside creditors of the society, because in point of fact he is only in the position of a partner who has given notice to withdraw from the firm, and who is entitled to have his capital repaid to him. That is the nearest analogy that can be put, and, of course, such partner is not in the least degree entitled to that, either as against the creditors who became such before he gave notice to withdraw, or as against creditors who became such after the notice. But the argument was not put so high as that. It was said that he was a *quasi*-creditor. A *quasi*-creditor is not a creditor, and to say that he is a *quasi*-creditor is to say that he is more of a partner than a creditor; and if he be more of a partner than a creditor, it is clear that a withdrawing member must be treated, for the purposes of this case, as between him and his copartners, not as a creditor but as a partner. I am in the position in which the Court is always placed when the assets of a company, which is being wound up under the authority of the Court, have to be applied in satisfaction of outside creditors, and there remains a surplus which will have to be dealt with. What says the 133rd section of the *Companies Act*, 1862? Why that, subject to the rights of outside creditors, unless it be otherwise provided by the

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regulations of the company, the property shall be distributed amongst the members according to their rights and interests in the company. I would also point out that sub-sect. 10 of that section says: "The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves." That throws me back upon this. Having paid the outside creditors, in order to depart from that equality, or from that rateable proportion which is an equitable equality, under which the members are entitled to receive back from the funds, some contract must be shewn that, in the event of dissolution or winding up, there shall be other than that rateable proportion. The burden is entirely on the parties who claim priority to prove that, and I consider that it would be enough for me to say that that is not made out clearly on the face of the articles; but I have come to the conclusion in construing the articles that it is pretty clear that it was not so intended, and that there is nothing in the articles to give them that priority in the distribution as between themselves and the other members of the society. There is only one question more, I think, and that is this:—Certain members who have contributed to this fund have, under another article, paid in advance the subscriptions which they were called upon, or might be called upon, to pay, and reference is made to a series of cases in which it has been determined that, where that has been done, in distributing the funds the Court has had regard to the contributions paid in advance. I do, not, however, think those cases are wanted, because here by the very terms of the articles that which is to be paid to each member are his subscriptions, and it is according to the amount of his subscriptions that he gets his money back. All that he can get, either by article 54 or article 56, is a repayment of the subscriptions standing to his credit. That means the subscriptions which he has paid, and how he has paid them does not in the least matter. If he has paid them in advance under that article which enables him to pay in advance, he does not get back an equal share in the funds, but what he gets back are his subscriptions. Therefore, each member gets back his subscriptions, if possible, in full; and if there be not sufficient to pay in

full, then he gets back a rateable proportion, with all the other members who have paid subscriptions. That is the declaration which I think ought to be made.

T. F. M.

From this decision Mr. *Godfray* appealed. The appeal was heard on the 13th of January, 1885.

Rigby, Q.C., and *A. W. Rowden*, for the Appellant:—

We contend that members of our class are entitled to be paid in priority to all other members of the society. That is the true construction of article 54. The subscriptions of each year formed a separate fund, and the rule places withdrawing members on the same footing as the legal personal representatives of those who are dead. The payments to withdrawing members are to be made out of the repayments in the order of date of their notices to withdraw. This rule gives us a charge on the repayments to the particular fund, and this source continues to exist after the fund is closed till all repayments are made and all fines and subscriptions paid. The closing of the fund does not affect our charge on the repayments. It is immaterial whether we are still members of the society or not, although certainly withdrawing members were not treated as members; they were not summoned to the general meetings. But we claim a charge as a contractual right, and there is nothing in the winding-up to affect that right. It was decided in *In re Blackburn and District Benefit Building Society* (1), which has since been affirmed by the House of Lords (*Walton* v. *Edge* (2)), that such a rule is not to be confined to the company while it is a going concern, but regulates the rights of members in the winding-up. Article 56 does not refer to withdrawing members, but regulates the distribution of the fund, after payment of the withdrawing members, among the continuing members. "Subject to payment of all expenses," includes the payment of the withdrawing members. *In re Land, Building, Government, and Guaranteed Securities Company* (3), is in our favour. There the rules were very similar to those in the present case.

(1) 24 Ch. D. 421. (2) 10 App. Cas. 33.
(3) 46 L. T. (N.S.) 758.

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Northmore Lawrence, for the continuing members of the society who did not give notice of withdrawal :—

In the first place, the special fund out of which the withdrawing members claim payment, and on which they claim a charge, ceased to exist when the company was wound up. In *In re Blackburn and District Benefit Building Society* (1) there was no special fund; the withdrawing members claimed to be paid out of the entire assets. On the other hand, in *In re Mutual Society* (2) the rules were almost identical with those in the present case, and there it was held that they ceased to apply when the company was wound up. So we say here article 54 is only applicable while the company is a going concern; it could never be intended that the instalments, which under article 44 were to extend over a period of twenty years, should go on for many years after the winding-up. It was the duty of the liquidator at once to call in the advances and realize the securities and distribute the assets among the members *pari passu* under sect. 133 of the *Companies Act*, 1862.

In the second place, the 54th article was not intended to apply after the fund is closed. So long as the fund remained open the withdrawing members had a right to be paid out of the instalments and premiums as they came in. When the fund is closed, either by all appropriations being made or under the powers of article 55 a, the withdrawing members come in under article 56 with the other members, and receive a dividend in the distribution. The right of closing the fund is paramount to all the rights of the withdrawing members. It would be straining the meaning of the words to hold that "expenses in reference to the fund" meant the repayment of the subscriptions of withdrawing members.

Hastings, Q.C., and *W. King*, for the liquidator.

Baggallay, L.J. :—

The question which we have to decide has arisen in the voluntary winding-up of a loan society in which moneys were contributed with a view of afterwards being paid back to the

(1) 24 Ch. D. 421. (2) 24 Ch. D. 425, n.

members in the form of loans. A variety of claims of priority have been made in the course of the liquidation. I think the voluntary liquidator has acted most wisely in availing himself of the provisions of the 138th section of the *Companies Act*, 1862, by presenting a petition to the Court, and drawing attention to the various points which have arisen, and asking for the decision of the Court as regards the rights of the several parties who have made claims before him.

The society seems to have been formed in the year 1872. The nature of it was this: contributions were made by the various members, and they became subscribers for various amounts, and in respect of the subscriptions which they so paid they were entitled to have loans granted in various forms, into the particulars of which I need not enter, beyond mentioning this one peculiar circumstance, that there was a separate fund formed by members subscribing during each successive year, and the funds that were raised by the contribution of the members in those successive periods have been distinguished as class A, class B, and so on. The articles of association contain provisions empowering members to withdraw, and also for the closing of the fund formed in the manner to which I have just referred. I should have thought it more logical that the provision as to closing should precede those with reference to withdrawing. In this case the withdrawal clause precedes the closing clause, and the withdrawal clause, article 54, is to this effect: [His Lordship read the material parts of article 54, and continued:—] Therefore, you have, first, the provision that he shall be entitled to a certain return on the payment of a particular fee. Then he is to be entitled to be repaid those sums according to the date of his notice, and only to be paid out of the particular fund from which he is drawing, that is to say, out of the money which shall be received by the society after the receipt of the notice. The provision appears to me to be simple in itself, and I do not understand that, either before Mr. Justice *Kay* or here, it has been argued that if there had been no winding-up in the case, the withdrawing member would have been deprived of his right to have the money repaid to him.

It appears that Fund A, which was the earliest formed of these

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funds, was closed in December, 1880. In March, 1881, special resolutions were passed varying to some extent the effect of article 55, to which I shall have occasion to draw attention presently. A certain variation was made in that, before any of the changes were made in the articles of association, which we have now to consider, and Mr. *Godfray*, who is the present Appellant, gave notice of withdrawal, and it has been arranged that Mr. *Godfray* on the present occasion shall represent all the members of the society who gave notices of withdrawal prior to the closing of the Fund A, and as to the other funds prior to the passing of the resolution in March, 1881. Other members who have made advances, or have given notices to withdraw, have also asserted certain rights to which attention has been drawn by the official liquidator in his petition, but those members are not before us on the present occasion. All we have to deal with now is this: whether those persons represented by the Appellant are or are not entitled to be repaid the amounts in consequence of their having given their several notices of withdrawal. There is a provision following that which I have read which provides generally for the closing of the funds, article 55, in the following terms: "As soon as the requisite advance has been made on every subsisting appropriation certificate issued in any fund, all subscriptions on certificates in such funds shall cease, and the fund shall be declared to be closed except for the purpose of distributing money recoverable by the society in respect of such fund as provided in article 56." The fund itself is closed except so far as there may be further accretions to it arising from future contributions, and those accretions will be carried to the credit of the account. Stopping there, there would seem to be no question that, apart from the liquidation proceedings, Funds A, B, and C having been closed, the rights of the persons claiming on those funds cannot be disputed at the present time. Then article 56 says, "All instalments and appropriations and other moneys (if any) which shall thereafter be received in respect of such fund" (that is the special fund) "shall, subject to payment of all expenses in reference to such fund, be distributed in dividends at such times as the directors may determine amongst the registered holders of such certificates" (that is, the original holders

of certificates in the particular funds, A, B, and C) "issued in respect of such fund, as shall be valid and subsisting at the time of such distribution—" Then come these singular words, "and continue to be entitled thereto" (that must mean the holders who continue to be entitled by virtue of the preceding articles) "in the first place in repayment in equitable proportion of subscriptions standing to the credit of each member of such fund, and in the next place in payment of the tontine bonuses in like manner." I have read and re-read that article, and I do not see how on the face of that article there is anything whatever to deprive those persons who have acquired rights under sect. 54 from having those rights acknowledged and effectuated. But then it is said, and this appears to me to have been almost the only ground that was argued before Mr. Justice *Kay*, and Mr. Justice *Kay* seems to have acquiesced in it, that assuming the 54th article gave a priority, it only applied so long as the society was a going concern, and that when it came to be wound up the members must rank *pari passu*. That seems to have been the ground of Mr. Justice *Kay's* decision. These contractual rights, it is said, should apply so long as it was a going concern, and as long as there was a sufficient amount to discharge the claims of the members whom the Appellant represents, and the contract was to be enforced and the members were to receive what they were entitled to; but that, inasmuch as the liquidation was entered into before their actual discharge, and possibly before the funds were in hand which would enable them to be discharged, therefore the contractual rights of those parties were altogether gone. That decision appears to have depended on the 133rd section of the *Companies Act*. That clause is one of a series of sections with regard to dealing with the assets and liabilities of every company that is in liquidation, and when the liquidator has ascertained and cleared off the whole of the debts of the company and all its liabilities, sub-sect. 10 says that the liquidator shall pay the debts of the company, and adjust the rights of the contributories amongst themselves. But how is he to do that? In this case it is admitted that all the debts have been paid. There are no outside creditors, in fact there are no rights to determine, except the rights *inter se* of the members; but that is what the

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liquidator is to do, namely, to adjust the rights of the contributories amongst themselves. It would appear to me to be necessary in order to do that, to find out what contracts the contributories entered into amongst themselves, and how effect can be given to those contracts.

Now, there again I can see nothing at all in the section which says that upon the happening of a voluntary winding-up those rights which the parties had by contract amongst themselves are to be entirely ignored. That view of the case has been in some way attempted to be supported by a decision of the late Master of the Rolls in the case of *In re Mutual Society* (1), and possibly there are some words in the introductory part of the late Master of the Rolls' judgment which would bear out that view, assuming, which I am by no means satisfied of, that we have got a full and sufficient account of his Lordship's judgment in that case, or of the facts of the case as they were before him. He is reported, however, to have said this (2), "The rules in question contemplate the society as a going concern, and they give directions as to how people are to be paid. But what is the theory of the society? The theory of the society is that it lends out its money, and it only gets money back by a return of what they call the appropriation—that is, the loans and premiums as they call it, which have been paid or which are liable to be paid by the borrowers—that is out of sums payable by the borrowers. Consequently, when a man withdraws from the society he is to have repaid him what he has paid." There he seems to have thought that no time for payment had ever arrived in that case until the liquidation, and that at that time there was no fund properly applicable for that purpose. Whether he was right in that particular matter I do not feel at liberty to form an opinion on, not having had the facts sufficiently explained to me; but if it is to be considered that the view taken by him would be applicable to such a case as we are now discussing I must dissent from the view which he there expressed; but I do not think that such was his meaning. We have in the present case the provision that the fund out of which these members are to be paid is moneys received by the society from time to time after receipt of the notice treating the time for

(1) 24 Ch. D. 425, n. (2) 24 Ch. D. 426, n.

payment as commencing when the money is received, whereas the language of the rule in the case of the *Mutual Society* was this, "Shall be entitled to be paid out of moneys existing at the time in any fund and composed exclusively of sums which shall have been paid as premiums on or received in respect of repayments of appropriations." Now, if "existing at the time," means those existing at the time when the withdrawal takes place, as far as I can gather from the report of the case, there was no such fund existing at the time, nor were there any funds existing at that time, nor did any fund come into existence at that time between that date and the winding-up order. Therefore, whichever view the Master of the Rolls took as to the time, there would appear to be some ground for supporting his view of the facts before him. But as I have said before, if it is attempted to carry that view of the case beyond the view of it which was taken by Lord Justice *Cotton* when the case of *In re Blackburn and District Benefit Building Society* (1) was before the Court, I for one must express my dissent from it.

Then we find ourselves in this position, that we have got a clear provision contained in article 54 giving a right to those whom the Appellant represents as claimants on Funds A, B, and C in priority to every other member. What may be the rights of the other persons after the rights of these particular claimants have been satisfied with regard to subsequent withdrawals or in respect of other funds than A, B, and C, or in respect of advances to members who have not withdrawn, it does not appear necessary at all to express an opinion. My opinion is that there is a contractual right on the part of the members represented by Mr. *Rigby* to be repaid in the particular manner I have mentioned out of the particular funds.

I wish to make one further observation, that the ground upon which it appears to me Mr. Justice *Kay* based his decision was that different rules would be applicable to the case after the winding-up order than before, which ground was removed by the decision in *In re Blackburn and District Benefit Building Society* when in the House of Lords (2).

(1) 24 Ch. D. 421. (2) *Walton* v. *Edge*, 10 App. Cas. 33.

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BOWEN, L.J:—

This is a question arising upon the construction of the rules of this particular society, and the case arises only between those who at one time or other have become members of the society, and it is a case which has nothing whatever to do with the rights of any creditors outside the members of the society. When the persons became members of the society they did so on the terms that their mutual rights were to be regulated by the rules of the society both while they continued to be members and after they had ceased to be members. The only way of arriving at the true view of those rights is to sit down and construe the rules. The question we have really to answer in the present instance, is whether the rights which accrue under article 54, upon the notice of withdrawal of members who wish to withdraw, are rights which obtain after the winding-up or after the closing of the fund referred to in articles 55 and 56. That depends upon the right way of reading these rules. Article 54 provides that members may give notice to withdraw from the society, and shall then be entitled to receive back their subscriptions and the cash value of their bonuses, and then comes the provision upon the true construction of which almost everything in the case turns: "Provided nevertheless that such payments shall only be made in the order of the date of the receipt of the notices, and only out of the moneys received by the society from time to time after the receipt of the notice in repayment of appropriations and premiums to the credit of the particular fund from which such withdrawal takes place." Now by this proviso a source is created which is not the fund itself from which the withdrawal takes place, but which consists of payments which are to be made to the fund, or, is a channel which is to flow into and to feed it; and, subject to any withdrawal which may be made, it is to go to those who have the right to intercept it before it gets into the fund.

Now the first argument suggested by Mr. *Northmore Lawrence* was this, he said that as soon as there is a winding-up that provision ceases to have any effect, and this source is no longer applicable to satisfying demands of withdrawing members. I

ask, why not? What is there in the articles to shew that this source is not still just as applicable after a winding-up as before a winding-up to meet such claims, there being no question of the rights of creditors outside? Mr. *Northmore Lawrence* says, Could it be supposed that these appropriations and premiums, which are under article 44 to be repaid by equal quarterly instalments extending over twenty years, would still be "moneys received by the society from time to time after the receipt of the notices" after the winding-up? The answer to that seems to me to be this, that it follows from article 44 itself, that the right to receive them is independent of the winding-up, and as to these moneys which are charged, so to speak, and appropriated to the satisfaction of the claims of withdrawing members, the right to receive them must continue after the winding-up for the purpose of satisfying those claims; or at all events it is difficult to see why the society is entitled to sell them and to put the money into its own pocket. The true view of the case with regard to the winding-up seems to me to be this, that under article 54 there is a provision absolute in its terms which charges all these moneys received for repayment, appropriations and premiums to satisfy the claims of withdrawing members, and that there are no words to cut down their right to look to that source by limiting it to the period before the winding-up of the company.

Then Mr. *Northmore Lawrence* also says that even if the winding-up does not put an end to the right of the withdrawing members to be paid out of this source, yet as soon as there is a closing of the fund under articles 55 and 56 their right ceases. That depends upon the true construction of articles 55 and 56, and if upon the reading of articles 54, 55 and 56, the true view is that this was only to be the source out of which the claims were to be paid so long as the fund was not closed, but when closed it was to be no longer the source, then Mr. *Northmore Lawrence* would be right; but I think the opposite is the true construction. I think that under articles 55 and 56 the closing of the fund is a closing which in no way affects the rights of the withdrawing members to look to this source for payment. That is shortly the ground upon which I think the judgment of the learned Judge in

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the Court below cannot be sustained. It seems to me that this train of reasoning is in accordance with the train of reasoning laid down by the Court of Appeal in *In re Blackburn and District Benefit Building Society* (1), and which was affirmed by the House of Lords, although I repeat what I said at the beginning of my judgment, namely, that this is a pure question of construction of the rules of this particular society and no more.

For the same reason it seems to me that the true answer to the argument sought to be drawn from the *Mutual Society Case* (2), and the decision of the Master of the Rolls is that such case was decided upon the rules of another society, which are not the same rules as the present, and I do not think there is any principle of construction at all to be derived from that case which applies to the present; but if any principle of construction is to be derived from that case which is different from that which I have stated, I should differ from the late Master of the Rolls, because I must say I should prefer my own construction to his. However I must confess that I do not think there is any principle of construction to be drawn from that case which is at all applicable to the present.

FRY, L.J.:—

I am of the same opinion. As we are differing from the judgment of the learned Judge of the Court below, it is only proper that I should add a few words explaining the reasons why I differ from him. Mr. *Northmore Lawrence*, who has put his case very clearly before us, has argued it on two grounds. In the first place he has said that the right of the withdrawing member to receive payment out of the particular fund is determined by the winding-up; and in the second place he has said that it is determined by the closing of the fund.

Now the first inquiry is—and I agree that it is merely a question of construction—Has the winding-up put an end to the right which the withdrawing members are admitted to have had during the continuance of the funds in the society to payment out of a particular fund. It is said that the late Master of the Rolls in the case of *In re Mutual Society* laid down a general principle,

(1) 24 Ch. D. 421; 10 App. Cas. 33. (2) 24 Ch. D. 425, n.

and I believe I shall not be misstating Mr. *Northmore Lawrence's* argument when I say that the principle according to his contention was this, that where a fund is created by payments extending over a period of time, and made in a particular manner, and the effect of the winding-up is such that after the winding-up the payments cannot be continued to the fund in the same manner and form as before the winding-up, then the fund must after the winding-up be treated as non-existing, and any person who was entitled to repayment out of that fund loses by the winding-up that right to repayment. I do not think that the Master of the Rolls intended to lay down, or did in fact lay down, any such general proposition in the case of *In re Mutual Society* (1), and if he did lay it down I should venture very respectfully to differ from his judgment. I do not think that necessarily a variation in the manner and form of payment to a fund determines the existence of the fund, or extinguishes the rights of persons who have charges on or contractual rights against the fund. I think, as a general rule, the Court does not look to the manner and form or constitution of the fund so much as to the substance, and if it see that the fund is the same after the winding-up as before, although the mode of payment may be somewhat different, I do not think it would treat the fund as non-existent. But suppose the rule were as Mr. *Northmore Lawrence* has asked us to hold it to be, is it clear in this case that the manner and form of payment to the fund on which these withdrawing members have a right is varied by the winding-up? What is the fund as defined by clause 54 on which they have the right? It is: "The moneys received by the society from time to time after the receipt of the notice in repayment of the appropriations and premiums to the credit of the particular fund from which such withdrawal takes place." How are those payments altered by the winding-up? Those payments are regulated by article 44 of the articles of association, which provides that they shall be equal quarterly instalments extending over a certain period. For anything that I know, the most convenient way of realizing the fund may be by allowing those quarterly payments to go on. It certainly might be so if the fund had very nearly reached its termination.

(1) 24 Ch. D. 425, n.

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But supposing the liquidator instead of receiving those quarterly payments were to realize the securities by selling them, which is what Mr. *Northmore Lawrence* suggests would be the course pursued, would that vary the rights of the persons who had a *quasi* charge on those payments? Surely the equitable view would be that the sale by the liquidator would not affect the rights of the various persons on the fund. So far from that particular mode of realizing the fund extinguishing the right, the right would be preserved against the fund, however realized. I think therefore that the winding-up has in no way altered or extinguished the rights of the parties claiming a charge on the fund.

Then, in the next place, it is said that the closing of the fund has extinguished the right. That, again, is a pure question of construction, and the view I take is this, that the 54th article has given a right to the members who have withdrawn to receive out of the particular funds, the description of which I have read from the 54th article, a particular sum: a sum to be ascertained at the time when the notice of withdrawal is given, that sum representing the total amount of subscriptions already paid by the withdrawing members, and the present cash value, ascertained by the actuary, of the profits of the company which had been declared and which were payable *in futuro*. Those two sums would be ascertained, and the total amount of the withdrawing members' claim would be paid out of the contributions to which I have already referred. The closing of the fund has nothing whatever to do with the withdrawal of the members. It depends on the happening of a totally different contingency, namely, an advance being made on every certificate issued. When that happens the fund is to be closed. Why, one asks oneself, should that contingency affect the rights of the members who have previously withdrawn? If they have agreed that it should affect them, then it must affect them; but it has no natural relation to those rights, and in the absence of any agreement it would be an unjust result that the closing of the fund should affect those rights. But when we come to look at the mode of distribution of the fund which is so closed, it seems to be reasonably plain that it is intended to be distributed among the continuing members, and that the distribution is one intended to be made subject to the rights of the withdrawing members. I

come to that conclusion from the whole language of the clause, but there are two expressions in that clause which seem to me to be very pointed. One is to be found in those words "continue to be entitled thereto." It may be difficult to find the precise meaning of the word "continue," but I think that it refers to the registered holders of certificates, and that the words are introduced for the purpose of giving the sole right in the fund to the continuing members, and for the purpose of excluding from all participation in the fund so under distribution the withdrawn members. But why are they excluded from this fund? Because the fund exists only after they have been satisfied, and therefore is a fund on which they have no claim.

In the second place, it is to be observed that the fund to be distributed is distributable in the payment of tontine bonuses. It is quite true that this is to be in equitable proportions, but what right have the withdrawn members to any portion of the tontine bonuses? Those tontine bonuses represent the profits of the fund, whereas the withdrawn members have received all their right to profits in the fund by the payment of the cash value of the bonuses ascertained by the actuary. That, again, is a strong circumstance to shew that the persons amongst whom the fund is to be distributed are only the continuing members. Therefore I think the closing of the fund is between the continuing members only, and is made without prejudice to the rights of the withdrawn members which had accrued before the fund had been closed. For these reasons I find myself compelled to differ from the learned Judge of the Court below.

There is only one further observation which I would make, and it is this: The 133rd section of the *Companies Act*, 1862, requires the equal distribution of the funds among all the members, and it is contended that unless the 56th article provides a distinctly different mode, the whole funds of the society ought to be distributed with equality amongst all the members. But when I ask myself what is equality between the withdrawn members and the continuing members, I ask a question which I am unable to answer, and so far as the argument has gone on the present occasion, no materials have been furnished which enable me to answer the question. I do not mean to say that if the rules of the society

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provided in distinct terms that there should be an equal distribution amongst the two classes, the Court would not struggle to do its best to find a meaning; but there is no natural or ostensible equality between continuing members and withdrawn members. Therefore I think there is nothing in the equitable doctrine of equality to interfere with the strict observance of the articles. For these reasons I agree with the judgment of the other members of the Court.

Solicitors: *J. D. Peard; Basil C. Godfray.*

M. W.

C. A. 1885 *Jan.* 15.

DUNN *v.* FLOOD.

[1882 D. 2790.]

Vendor and Purchaser—Depreciatory Conditions—Sale by Trustees.

Trustees for sale under a will put up for sale by auction certain lands in numerous small lots, with conditions providing (*inter alia*) that the title should commence with the conveyance to the testator ten years before; that every recital in any abstracted document should be conclusive evidence of the fact stated; and that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit-rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The sale was made also subject to certain general conditions restricting the occupation of the land. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions; and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements or quit-rents affecting the property:—

Held, that the condition as to existing tenancies and restrictive covenants was depreciatory, and that the objection was a good defence to an action for specific performance by the trustees against a purchaser.

But, *semble*, the condition limiting the title to ten years, having regard to the number and smallness of the lots, was not unreasonable.

THIS was an appeal from a judgment of Mr. Justice *North* (1).

James Noble, by his will, dated the 9th of June, 1882, devised all his real estate to the Plaintiffs, *B. Dunn* and *J. Wicks*, upon trust for his wife for life, and after her death (which happened in

(1) 25 Ch. D. 629.

his lifetime) at the discretion of the trustees to sell the same and to invest the moneys to be produced by such sale upon the trusts therein mentioned.

The testator died in August, 1882, and in November, 1882, the Plaintiffs caused the real estate to be put up for sale by auction in thirty-three lots. The property consisted of freehold building land in the town of *Reading*.

The 4th condition of sale provided that as to Lot 1 the title should commence with a deed dated the 31st of May, 1873; and as to the rest of the lots, with a conveyance from *J. H. Johnson* to the testator, dated the 2nd of October, 1872, and every recital or statement in any abstracted document should be deemed conclusive evidence of the fact or matter recited or stated therein, or to be assumed or implied therefrom.

The 6th condition was as follows:—

"The respective lots are sold subject to the existing tenancies, restrictive covenants, and to all easements, quit-rents, and other incidents of tenure (if any) affecting the same, and the respective purchasers shall covenant in their respective purchase deeds to observe and perform the stipulations and restrictive covenants comprised or referred to in the several abstracted muniments so far as the same may relate to the property purchased by them respectively, and to indemnify the vendors against the consequences of the breach of any such covenants. It shall be assumed that such stipulations and restrictive covenants have been complied with and performed hitherto."

The 8th condition provided that all requisitions or objections in respect of the title or abstract should be sent to the vendor's solicitors within eight days from the receipt of the abstract.

There were also what were called "general conditions" relating to the building and occupation of the houses to be erected on the land. One of these was that the purchaser of each lot should covenant not to carry on upon either of the said lots, or in or upon any messuage or building to be erected thereon, the trade or business of a brewer, hotel-keeper, or similar trade, following the words of the covenant in the deed of the 1st of June, 1872, hereinafter set forth. According to the evidence, it was stated by the

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auctioneer that all the restrictive covenants alluded to in the 6th condition were included in the "general conditions."

It was admitted by the Plaintiffs that the property was not in fact subject to any existing tenancies, restrictive covenants (other than aforesaid), quit-rents, or easements.

The Defendant *Flood* became the purchaser of several lots at the price of £702 10*s.*, for which he paid a deposit.

The title to the lots purchased by the Defendant was as follows:—

John Harris, who died in 1823, devised this piece of land (subject to the several life annuities which had come to an end) to his wife for her life, and after her death to trustees upon trust for sale. She died in 1871, and on the 22nd of April, 1872, the piece of land was sold and conveyed by the trustees to Messrs. *Simonds*, brewers, of *Reading*. By an indenture, dated the 1st of June, 1872, Messrs. *Simonds* conveyed the piece of land to *J. H. Johnson*, who thereby covenanted that he, his heirs and assigns, would not carry on, or permit to be carried on upon the premises the trade of brewer, hotel-keeper, inn-keeper, victualler, vintner, or dealer in wines, spirits, or beer. And that in case any breach of that covenant should be committed, it should be lawful for the vendors to enter upon the premises or any part thereof whereon such breach should have been committed, and to occupy and possess the same for their own benefit, until the trade or business so carried on should be discontinued, and also for the space of three calendar months from the time of such discontinuance; provided always that this covenant should not extend to charge any messuage or premises other than the particular messuage or premises on which such breach of covenant should have been committed. On the 2nd of October, 1872, *J. H. Johnson* conveyed the piece of land to *James Noble*, the testator of the vendors. In each of the conveyances were covenants for the production of the earlier deeds, those deeds not being delivered to the purchaser.

The vendors delivered an abstract of title, and within eight days the purchaser put in requisitions in which, among other things, he required that the beneficiaries under *Noble's* will should join in the conveyance. To this the vendors replied that the

beneficiary was an infant, and that the vendors had ample powers to sell under the *Conveyancing Act*, 1881, s. 35. The purchaser refused to complete the purchase, and the vendors brought the present action claiming specific performance and damages.

The purchaser's objections were (1) that the vendors, being trustees for sale, ought not by the conditions to have limited the title to the conveyance of the 2nd of October, 1872; (2) that the condition of re-entry in the deed of the 1st of June, 1872, was not referred to in the conditions and was a defect in the title; (3) that the extent of the restrictions did not sufficiently appear on the conditions.

Mr. Justice *North* held that the second objection was not tenable, as the condition of re-entry in the deed of the 1st of June, 1872, was void, as being too remote, but decided against the Plaintiffs on the first and third objections, and dismissed the action with costs.

From this judgment the Plaintiffs appealed.

Everitt, Q.C., and *MacSwinney*, for the Appellants:—

With respect to the first objection, namely, the shortness of the title, the trustees had a discretion under the will and under the *Conveyancing Act*, 1881, s. 35, and they have exercised it wisely. The property was intended for building, and was to be sold in thirty-three lots, which averaged £50 in value, and a long title would have caused great expense both to vendors and purchasers. We commenced with a purchase for value, not as in *Dance* v. *Goldingham* (1) with a settlement, or, as in *In re Marsh and Earl Granville* (2), with a voluntary settlement, which might be set aside.

As to the second objection, that the 6th condition was depreciatory and therefore the sale void, the purchaser did not take the objection within the time limited by the 8th condition, and it is now too late to do so. But assuming that it is now open to him to take the objection: we contend that the 6th condition is in the common form. If inserted by an absolute owner it would not be thought unreasonable. How then can trustees be blamed for inserting it? The words "if any" imply that the vendors believed

(1) Law Rep. 8 Ch. 902. (2) 24 Ch. D. 11.

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that there were no restrictive covenants or existing tenancies affecting the premises. Such a condition never has any effect in deterring purchasers, who pay very little attention to conditions of sale. It was the duty of the trustees to sell the land; they were exercising their discretion *bonâ fide* and the Court will not interfere with such exercise except in a gross case.

But assuming that the condition was depreciatory, the purchaser has no right on that account to resist specific performance. The trustees are responsible to their *cestuis que trust* if the price realized was a very good one. But the purchaser is bound by his contract, and cannot complain, for he is not injured. In the cases where sales by trustees have been set aside on account of depreciatory conditions, it has been at the instance of the *cestuis que trust* of the vendors, not of the purchasers.

[FRY, L.J.:—The Court never enforces a breach of trust: *Rede* v. *Oakes* (1); *Harnett* v. *Yielding* (2); *Ord* v. *Noel* (3).]

If not entitled to specific performance we are entitled to damages.

W. W. Karslake, Q.C., and *W. King*, for the Defendant, were not called on.

BAGGALLAY, L.J.:—

This is an appeal against a judgment of Mr. Justice *North* dismissing with costs an action by the Plaintiffs for specific performance of a contract for the sale of land made in November, 1882, between the Plaintiffs and the Defendant. The property, the subject of the contract, was a piece of building land situate in the town of *Reading*, being portion of the site of the garden of a public-house. A street had been laid out and the houses on the opposite side of the street had been erected, as was stated in the particulars of sale. It is plain, therefore, that a higher price was likely to be realized from the sale than the testator gave for the land in 1872. The grounds on which specific performance was resisted by the Defendant were objections made to the conditions of sale.

The first condition objected to was condition 4, by which the

(1) 4 D. J. & S. 505. (2) 2 Sch. & Lef. 549, 553. (3) 5 Madd. 438.

title was limited, as to Lot 1, to three deeds, and as to the other lots, to two deeds, by which the property was conveyed to *J. Noble*, the testator, and it was contended by the Defendant that to limit the title in this way was not a discreet way of exercising the trusts for sale under which the Plaintiffs were selling. My general view of the discretion of trustees is that, however large their discretion may be—and it is very large under the 35th section of the *Conveyancing Act*, 1881—they must exercise it in a reasonable and proper manner: they must not introduce a depreciatory condition. This rule is clearly enunciated in the decision in *Dance* v. *Goldingham* (1), which, in fact, only recognised the established principle of equity. The trustees in the present case had a trust to sell at their discretion, in as wide terms as they could have, but it must be reasonably exercised. The first question, therefore, is whether in limiting the title in this way they acted reasonably. All cases must be determined on their particular circumstances, and my present impression is that the Plaintiffs did not err in so limiting the title, having regard to the nature of the property sold. It was a piece of vacant land, intended to be sold for building cottages on, and for that purpose divided into thirty-three lots, and in the result a fair price was obtained for the land, and I should think, though we have not heard the counsel for the Defendant on that point, that, having regard to the fact that a longer title would have necessitated a longer abstract and additional expense, both to the purchaser and to the vendors, thereby diminishing the proceeds payable to the *cestuis que trust*, they had not gone beyond what might fairly be done.

The next objection was to condition 6. [His Lordship read the condition.] I must confess that it appears to me that inasmuch as no tenancies are existing and there are no restrictive conditions except those included in the "general conditions," this condition must have had the effect of suggesting to the purchaser that he was buying a property subject to possible liabilities which would impose a burden more or less heavy. If there had, as is usual, been a clause for compensation the case might have been different; but here there was no proviso for compensation, the purchaser was to take the property with its

(1) Law Rep. 8 Ch. 902.

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liabilities just as it stood. It was argued that it was usual for absolute owners of land to insert a condition as wide as this; that may be so, but it does not follow that trustees ought to do so; it only shews the pitfalls by which trustees are surrounded. The Plaintiffs consulted respectable solicitors, but they must nevertheless take the consequences if they are led into any mistake. I cannot imagine anything more careless than to suggest difficulties such as the existences of tenancies and restrictive covenants which do not exist, with no clause of compensation if they did exist. Therefore I think the insertion of the 6th condition by the trustees was not a reasonable exercise of their discretion.

One further objection was decided by Mr. Justice *North* in favour of the vendors. There was a condition for re-entry in the deed of the 1st of June, 1872, not noticed in the conditions of sale, which was objected to as a defect in the title; this right of re-entry was held by Mr. Justice *North* to be void for remoteness. We have not heard the counsel for the Defendant, but as at present advised I concur with Mr. Justice *North* that this right could not be enforced being void under the rule against perpetuities.

If this action had come before me in the first instance I might have expressed my regret at the conclusion I was obliged to come to, and might have relieved the Plaintiffs from the costs of the action; as was done in *Rede* v. *Oakes* (1). But in that case the Court of Appeal reversed the decision of the Court below, who decided in favour of the vendors, but here the vendors have thought it right to appeal against the decision which was against them, and I think that the costs of the appeal must go to the successful party in the usual way.

BOWEN, L.J.:—

I am of the same opinion. I wish only to add a few words. The discretion of trustees may be unlimited, but it must be exercised in a reasonable manner; it is a discretion, not caprice. The trustees in the present case had a discretion to sell, but it was their duty in the first place to tell the truth, this was a duty due to themselves, to their *cestuis que trust*, and to the purchaser. In

(1) 4 D. J. & S 505.

the second place it was their duty not to suggest any difficulty in the title, that did not exist. The condition principally objected to is condition 6. Would a prudent vendor who wished to sell at a fair price insert such a condition in such a case as this? It appears to me to be full of warnings and cautions which, although in some special cases it may be proper to insert them, yet amounted in the present instance to a suggestion of traps and pitfalls where none really existed. Taking into account that there was no compensation clause I think such a condition was calculated to frighten away purchasers. It was argued that the trustees got a good price at the auction; but that is not to the point, the question is whether it might not have been a better one. By shewing the number of those who came to the auction to bid how can we draw any inference as to the number of those who stayed away. Therefore on this ground it appears to me that the sale was not properly conducted.

It is contended that the purchaser cannot take the objection, that as between the trustee and the *cestuis que trust* the sale was improvident. How can this argument prevail? How can an unconscientious trustee be entitled to the assistance of the Court in carrying out a contract which is a breach of trust?

Then it was said that if not entitled to specific performance the Plaintiffs were entitled to damages. But the answer to that is that the *cestuis que trust* whom they represent were not injured by the contract being broken off. Therefore, in my opinion the whole claim of the Plaintiffs fails.

FRY, L.J.:—

I am of the same opinion. The main contention was with regard to the 6th condition. Mr. *McSwinney* in his brief and effective argument suggested that the question was whether the condition was such as an absolute owner would reasonably insert. I will try the question in that way. The condition says, "The respective lots are sold subject to the existing tenancies and restrictive covenants." There were no existing tenancies, and the only restrictive covenants were those which were set forth in the "general conditions." Then the condition goes on to say, "and to all easements, quit rents, and other incidents of tenure (if any)

C. A. 1885 DUNN v. FLOOD. Fry, L.J.

affecting the same." It was said that the words "if any" mean that there are none known to exist. That may be so in an ordinary case, but here the condition goes on to say that the respective purchasers shall covenant in their respective purchase deeds to observe and perform the stipulations and restrictive covenants comprised in and referred to in the several abstracted muniments. In the case of all except one of the lots there were only three documents abstracted, and in one only of them were there any restrictive covenants, and they were the same as those set forth in the "general conditions." In my opinion, no prudent vendor desiring to sell land for building purposes would have run the risk of frightening away purchasers by inserting such a condition and providing no compensation. It tells the purchasers that there may be restrictive covenants which are not disclosed, and does not tell them that the only restrictive covenants that exist are disclosed. It has a direct tendency to drive away the class of purchasers which the vendors wished for. Then it is said that the purchasers pay very little regard to conditions of sale. I cannot agree to that. The condition suggests serious difficulties, and I think that a builder of ordinary intelligence would think that he was buying a property encumbered with restrictive covenants and easements of various kinds which might render his purchase of little value to him. The conditions seem to me eminently calculated to frighten away purchasers.

Then it was suggested that the purchaser cannot avail himself of the objection because he did not take it in time. I am not satisfied that he did not take it in time. He required the beneficiaries under the will to join in the conveyance. He had no right to require this unless the trustees had sold under terms which they had no right to impose. But if the purchaser had not taken the objection at all before the action was brought, does it follow that this Court would enforce a contract which was a breach of trust? It was contended that the only cases in which the Court has refused to enforce such a contract have been where the trustees selling have been defendants, and it was argued that where the vendors are plaintiffs the Court will enforce specific performance. I think such a view is abhorrent to the practice of the Court. In truth, however, the question is not reasonably open.

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Rede v. *Oakes* (1) is a distinct authority that where the plaintiffs are vendors who have entered into a contract which is a breach of trust, they cannot enforce it against the purchaser. The appeal must be dismissed with costs.

Solicitors for Plaintiffs: *H. D. Marshall*, agents for *Beale & Martin, Reading.*

Solicitors for Defendant: *G. T. Powell*, agents for *F. Elkins, Reading.*

M. W.

SAWYER *v.* SAWYER.

C. A. 1883 CHITTY, J. *Nov.* 19. C. A. 1885 *Feb.* 5, 14.

[1878. S. 355.]

Trustee—Liability—Breach of Trust—Concurrence of Cestui que Trust—Right to Indemnity—Married Woman.

Where a *cestui que trust*, who is party to a breach of trust, is a married woman, and the trustees claim a right of retainer against her life interest in the settled funds to indemnify them against their breach of trust, they are bound to shew that she acted for herself in the breach of trust, and was fully informed of the state of the case.

THIS action was commenced in November, 1878, by the children of *Edward Sawyer* and *Betsy*, his wife, against *John Sawyer*, the surviving trustee, and *James Allwright*, the executor of the deceased trustee of the marriage settlement of Mr. and Mrs. *Sawyer*, for the purpose of making the trustees liable for certain money, subject to the trusts of the settlement, which had been lost. Mr. and Mrs. *Sawyer* were made parties as Defendants.

The settlement was dated the 23rd of November, 1859, and thereby a reversionary fund, which fell into possession in 1868, was settled upon trust upon Mrs. *Sawyer* during her life for her separate use, but without any restraint on anticipation, and after her death in trust for her husband during his life, and after the death of the survivor, upon trust for the children of the marriage, and the trustees were authorized to vary and transpose the securities with the consent in writing of the husband and wife during their joint lives. Part of the fund consisted of a sum of £2346 19*s.* 1*d.*, New 3 per cent. Annuities, which were

(1) 4 D. J. & S. 505.

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sold out in successive portions by the trustees, and the proceeds of the sales were advanced to the husband in breach of the trusts of the settlement. *Edward Sawyer* became bankrupt, and the money advanced to him was almost entirely lost.

On the 17th of February, 1879, Mr. Justice *Chitty* gave judgment in the action, and thereby declared that the trustees, *J. Sawyer* and *J. Allwright*, were jointly and severally liable to replace the same sums, amounting to £2346 19*s.* 1*d.*, New 3 per Cents., which had been sold by the trustees and advanced to Mr. *Sawyer*, and an inquiry was directed at whose request and under what circumstances the money had been sold out and advanced.

The Chief Clerk made his certificate, by which he found that the several sums of £500, £700, £600, and £546 19*s.* 1*d.*, New 3 per cent. Annuities, making together £2346 19*s.* 1*d.*, like annuities were sold by the bankers at *Reading* under powers of attorney, which were with the consent of *Edward Sawyer* and *Betsy*, his wife, signed by the two trustees, *J. Sawyer* and *John Allwright*, and that *John Sawyer* exercised the said powers at the request of *John Allwright*. The necessary directions in the matter for the sale of the said sum of £2346 19*s.* 1*d.* were given by *J. Allwright*, and the sale of the stock was made as follows: £500 in March, 1872; £700 in May, 1873; £600 in March, 1874, and £546 19*s.* 1*d.* in February, 1875. The proceeds of the sale of the £500 stock were carried direct to the account of *Edward Sawyer* at the bankers. The proceeds of the sums of £700 and £600 stock were carried to the credit of *John Allwright*, and were transferred by his cheque to the account of *Edward Sawyer*. The proceeds of the sale of £546 19*s.* 1*d.* stock were placed to the credit of *John Sawyer* and *John Allwright*, and were transferred to the account of *Edward Sawyer* at the request of *John Allwright*. *John Sawyer* was aware that his co-trustee intended to advance the money to *Edward Sawyer*, but he relied on *John Allwright* to do what was right, and he himself received no part of the funds of the sale.

Mr. and Mrs. *Sawyer* executed promissory notes upon the sale of each of the sums of stock, and after payment of the funds to Mr. *Sawyer*, in which they severally and jointly promised to pay the amounts on demand to *John Allwright* and *John Sawyer*, as their trustees, for value received.

When the case came on for further consideration, the Defendants, *J. Sawyer* and *James Allwright*, claimed a right to retain the income of the property subject to the trust in order to recoup themselves for the money which they were liable to repay in respect of the breach of trust.

The further consideration was heard before Mr. Justice *Chitty* on the 19th of November, 1883.

Langley (*Davey*, Q.C., with him), for *Allwright*.

McSwinney, for *J. Sawyer*.

Romer, Q.C., and *H. M. Williams*, for Mrs. *Sawyer*.

Jolliffe, for the Plaintiffs.

CHITTY, J. :—

The first point I have to decide is with reference to the claim which the trustees make to retain the income to which Mrs. *Sawyer* is now entitled for her separate use in the trust estate. The object of the action was to establish the liability of the trustees for a breach of trust. The circumstances under which the breach of trust took place are to be found in the certificate of the Chief Clerk. The Plaintiffs, being the children, are entitled in remainder, and the first life interest in the settlement is given to Mrs. *Sawyer* for her separate use. There is no restraint on anticipation, and her husband *Edward Sawyer* was entitled to a life interest after her death, but has since become a bankrupt, and his trustee in bankruptcy is not before the Court. [His Lordship then stated the facts as found in the certificate, and continued :—] The Chief Clerk has found that the sales were made merely with the consent, not at the request, of the married woman, and the counsel for the trustee have argued the case on the footing that the Chief Clerk means request, and that I must find within the certificate that there was a request made by the lady. I decline to apply such a construction to the certificate. In the face of the finding in the certificate, I can only hold, as I do hold, that the lady was a consenting party to the sales. Then upon that it has been argued, or rather suggested that a tenant

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for life consenting to a breach of trust is liable to have the funds so applied, recouped or retained out of his income. Now there is no authority for that proposition, and as I say it has been rather suggested than argued.

The well-known case of *Raby* v. *Ridehalgh* (1), proceeds upon the footing that each person at whose instance the trustees have committed a breach of trust, is liable to recoup the subject of that breach of trust to the trustees. I am not aware of any decision that has gone beyond that, and I have no doubt that if there had been any decision, the researches of counsel would have produced it. I hold that the law is, that for the trustees to be entitled to the order which they now ask against the estate of the tenant for life, it must be shewn that the breach of trust was committed at the instance and request of the *cestuis que trust*. I make no distinction between instance and request, but it must be shewn clearly that the breach of trust was instigated by them, and that they were acting and moving parties in it. It strikes me as a novelty in law, and a proposition not founded on principle, to say that the person who merely consents, is bound to do more than what he says he consents to do. It does not mean that he makes himself personally liable, nor does he render any property liable to make it good. The case I have referred to proceeds upon the very plain principle that there are degrees with reference to the culpability of the persons who engage in a breach of trust. The persons who have set the whole matter in motion are the persons on whom the liability ought primarily to fall; in other words, they ought to indemnify the trustees who have been called upon to pay.

Then it is said, or rather again it is suggested more than argued, that the married woman has signed promissory notes, and therefore she has created a charge upon her separate estate. Where a note or bond has been given by a married woman, and there is a question whether the separate estate of the married woman is liable to answer the note or bond, the fact of there being the writing has been held to be a sufficient indication on her part that the demand shall be answered from her separate estate. Where there is no writing, the case depends upon the circumstances, and it

(1) 7 D. M. & G. 104.

must be shewn that the engagement of the married woman, which *primâ facie* is void because she is under coverture, and has no power to contract, was to be satisfied out of the separate estate. Now there was at one time a floating idea that a married woman's engagement operated by way of charge upon her separate estate, so that the person claiming might stand as a person having an interest in the fund, and would rank according to the priority of his charge; but that idea or floating notion has been altogether displaced by the recent authorities on the subject, and the general rule is what I now state, that the engagements of married women do not create a charge upon their separate estate, but are only engagements which have to be satisfied out of their separate estate. What the Court really does is in substance to award execution out of the separate estate when the demand is brought. There have been cases in which a receiver has been appointed which proceeded upon the footing of a charge, but if the idea which I have stated ever existed, it has long since been exploded, and what I have stated is the result of the authorities at present on the point. That being so, I cannot hold that this lady has done anything to charge her separate estate. The question then arises as to whether she has done anything, or entered into any arrangement, to bind her separate estate. This point has not been seriously argued, and I do not understand counsel to say that if this is a general engagement of a married woman they are entitled in this suit to share the benefit of that engagement. No argument has been addressed to me on that point, but if counsel really desire it I will hear anything they have to say and how they are going to put it, but this is not a suit for the purposes of getting equitable execution against a married woman. If they have any observations which they desire to make, I will hear them, but counsel thought the point not one to be raised, and, quite properly, as at present advised, did not raise it. Therefore, I so decide in the absence of any argument. The result is, that I hold there is no right to retain this married woman's life income. She is entitled to be paid it in the ordinary way. Of course, if the creditors proceed against her, that is another thing. They may be able to establish it, and so far as I can see they will, but it cannot be done in this suit.

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Then with regard to *Edward Sawyer*, it is plain from the certificate that he had the money, and it is perfectly clear that neither he nor anybody claiming under him can claim anything until he has made good the breach of trust. It is plain on reading the certificate not only with reference to the part which said he consented; but with reference to the other part, that it was done at his request because he had the money. There is no question that his life interest can be retained, but I cannot make any declaration against his life income at the present moment. It may be that he will die before his wife, and such a declaration would never have any practical effect; but I can give liberty to the trustees to apply at the death of the present tenant for life, that is *Betsy Sawyer*. If the event should be that she dies in her husband's lifetime, then there will be something for the trustees to have recourse to for the purpose of recouping to them what they are now claiming with respect to that breach of trust. That disposes of the main points that have been argued except this. The two trustees have entered into argument between themselves as to who is primarily liable for the breach of trust, and I was asked by one side to decide on the materials of the certificate. The other side objected to this. It appears to me it would be wrong to take the certificate as the sole material at all events for deciding any question of contribution between the two trustees, because this certificate is only a certificate made in a suit which is for the administration of the trust estate; and the contribution as regards the trustees, is no part of a suit of that class. All equities that have to be worked out between the *cestuis que trust* and the trustees as to payment, and as to recouping a breach of trust, or as to retaining a life income, those are questions to which this inquiry of course is directed, and the inquiry binds me, as I have stated, with reference to questions of that kind. But it would be wrong to hold that the certificate has been addressed to this question of contribution, and I decline to decide the question upon the materials before me.

1883. Dec. 3. The matter was again mentioned, when it was stated that the Defendants, *J. Allwright*, and *J. Sawyer*, had given each other cross notices of claim for contribution, one of such

notices having been given before, and one after, the Rules of the Supreme Court of 1883 had come into operation.

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CHITTY, J., was of opinion that the new Rule, Order XVI., rule 55, enabled the Court to make an order for contribution in a case like the present, and directed an inquiry as to the amount to be added to the judgment in the same terms as in *Butler* v. *Butler* (1).

C. A.

The Defendants, *J. Allwright*, and *J. Sawyer*, appealed from the judgment of Mr. Justice *Chitty*. The appeal was heard on the 5th of February, 1885.

Cozens-Hardy, Q.C., and *Langley*, for *J. Allwright*:—

A *cestui que trust* who consents to a breach of trust is liable to indemnify the trustees to the extent of his interest under the settlement: *Trafford* v. *Boehm* (2). It is not necessary to shew that the breach of trust was committed at his request; acquiescence is sufficient: *Lincoln* v. *Wright* (3). This liability is not measured by the amount of benefit obtained by the breach of trust. He is responsible for the whole fund lost to the extent of his own interest under the settlement: *Raby* v. *Ridehalgh* (4). But in the present case Mrs. *Sawyer* really participated with her husband in the benefit derived from the breach of trust. A married woman is a *feme sole* with regard to her separate estate, where she is not restrained from anticipation. Her participation in the breach of trust created an equitable charge on her separate estate. She not only consented to the advance to her husband, but took an active part in the transaction by joining in the promissory notes; she became a surety for him, and on his bankruptcy the right to enforce the suretyship arrives: *Lewin* on Trusts (5); *Green* v. *Wynn* (6); *Heatley* v. *Thomas* (7).

MacSwinney, for the Appellant, *J. Sawyer*, supported the same view.

Romer, Q.C., and *H. M. Williams*, for Mrs. *Sawyer*:—

If Mrs. *Sawyer* had not been a married woman she would only

(1) 14 Ch. D. 329.
(2) 3 Atk. 440.
(3) 4 Beav. 427.
(4) 7 D. M. & G. 104.
(5) 7th Ed. p. 648.
(6) Law Rep. 4 Ch. 204.
(7) 15 Ves. 596.

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have been liable to the extent to which she had received capital or income under the breach of trust. That is the true measure of her liability, not the amount of her interest under the settlement. *Raby* v. *Ridehalgh* (1) is consistent with this. In this case Mrs. *Sawyer* has received nothing herself; therefore if she had been *sui juris* the trustees would not have recovered anything against her. But she was not *sui juris*. She could not consent to a breach of trust. A married woman can contract for a charge on her separate estate, but she cannot subject herself to liability by doing a tortious act. The trustees do not claim a charge under any contract, but claim indemnity on account of her participation in the breach of trust. There is no evidence that Mrs. *Sawyer* understood her real position. The breach of trust was not committed at her instigation, but at that of her husband. It was the duty of the trustees to protect her against the influence of her husband, and having neglected their duty they have no equity against her. With respect to the promissory notes, they gave no charge on the separate estate. If Mrs. *Sawyer* had been sued on them as surety she would have had a good defence.

Cozens-Hardy, in reply, referred to *Clive* v. *Carew* (2) and *Payne* v. *Little* (3).

1885. Feb. 14. FRY, L.J., delivered the judgment of the Court (*Baggallay*, *Bowen*, and *Fry*, L.JJ.) as follows:—

This is an action begun by the infant children of Mr. and Mrs. *Sawyer* to compel the trustees to make good breaches of trust in respect of the trust funds comprised in the marriage settlement of Mr. and Mrs. *Sawyer*, bearing date the 23rd of November, 1859.

By that settlement a reversionary fund which fell into possession in 1868 was settled upon trust for Mrs. *Sawyer* for life for her separate use, but without any restraint on alienation, with remainder to her husband for life, with remainder to their children, and the trustees were authorized to vary and transpose the securities with the consent in writing of the husband and wife during their joint lives.

(1) 4 D. M. & G. 104. (2) 1 J. & H. 199.
(3) 26 Beav. 1.

A portion of the trust fund consisted of a sum of £2346 19*s.* 1*d.* New 3 per cent. Annuities, which was in the year 1872, and three following years, sold in successive portions by the trustees, and the proceeds of these sales were paid over to the husband in breach of the trusts of the settlement.

The circumstances attending these transactions are stated in the Chief Clerk's certificate. [His Lordship stated the facts as given above, and continued:—]

Having regard to the consent given by Mrs. *Sawyer* to the sale of the stock and as we conclude to the payment of the proceeds to her husband and to the promissory notes given by her to the trustees as such, and further to the fact that she as *cestui que trust* was entitled to receive moneys from the same trustees to whom she had become indebted, we are of opinion that if, instead of being a married woman, she had been a man of full years, there would have existed a right of retainer against her life interest to make good her debt which might have been enforced either by the children as *cestuis que trust* in remainder or by the trustees.

The Plaintiffs, her children, are not insisting on any right against their mother, and the question before us now is whether the trustees are entitled to enforce this right of retainer against Mrs. *Sawyer*. Does the fact that she was a married woman make any, and if so what difference in her liability as against the trustees? This appears to us to be the important inquiry in this case, and in answering that inquiry we do not think it necessary to consider in particular whether the right of retainer which would have existed if she had been a man, owed its origin merely to concurrence in the breach of trust, or to that circumstance taken together with the promissory notes.

The substance of the transaction is a charge created by a *cestui que trust* in favour of a trustee by way of indemnity against a breach of trust committed by him.

The primary duty of the trustee was the protection of the fund which he did not protect, and before a trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should shew that the charge or right of retainer was

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created by her with a full knowledge of all the circumstances. It is probable that in the case of a man of full years the Court would presume him so to be acting, but in the case of a *feme covert* we do not think the presumption exists in favour of the trustee whose primary duty was to protect the fund for her benefit.

The earliest case which throws much light on this point appears to have been *Ryder* v. *Bickerton* before Lord *Hardwicke*, in 1743 (1). There a fund was settled for the benefit of the plaintiff, a married woman, and her children, which in violation of the trust for investment had been placed in the hands of the plaintiff's uncle, and it was suggested that the plaintiff had by her conduct precluded herself from complaining of the breach of trust. Lord *Hardwicke* said, "It is said that there may be a case in which a married woman may not have power to act within the terms of a trust created before marriage, and yet if she draw in a trustee to do anything against her benefit, she being so concerned, shall not afterwards be admitted to take advantage of it against the trustee; which I believe is so: but in all these cases it must be where the persons so to be affected might have been fully informed of the state of the case. So that the question is, whether the plaintiff appears to have been fully informed of the state of the case"—a question which he then proceeded to consider, and answered in the negative.

In *Mara* v. *Manning* (2) a fund belonging to the wife was vested in trustees to pay the interest to the husband till death or insolvency with remainder to the wife for life, and in the event of the husband's insolvency for her separate use; the trustees at the instance of the wife lent part of the fund to the husband who was afterwards discharged as an insolvent. The Court held that the estate for the separate use of the wife during her husband's life was not bound, on the ground that at the time the trustee committed the breach of trust at the wife's instance it was a fund to which she might never become entitled, and the question whether her life interest in remainder after her husband's death was bound was left undetermined. The particular point decided is not of importance for the present case, because Mrs. *Sawyer's* interest was in possession at the time of the breaches

(1) 3 Sw. 80, n.; 1 Eden, 149, n.

(2) 2 J. & Lat. 311.

of trust, but the observations of the Lord Chancellor of *Ireland* (Sir *Edward Sugden*) are important. "I hope," he said (1) "that the Court may feel itself at liberty to treat a woman entitled for her separate use in possession as *sui juris*, so as to bind her interest where she prevails upon her trustee to commit a breach of trust. But this could only be where the wife really acted for herself."

All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, so far as we are aware, cases in which she has been an actual actor in the transaction herself, such are the cases of *Crosby* v. *Church* (2); *Clive* v. *Carew* (3); and *Pemberton* v. *M'Gill.* (4) In no case, so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust.

Have the Defendants, the trustees in the present case, shewn that Mrs. *Sawyer* was fully informed of the state of the case (to use the language of Lord *Hardwicke*) or that she really acted for herself (to use the language of Lord *St. Leonards*)? They have, in our opinion, failed in giving such proof, and this appeal must therefore be dismissed with costs.

Solicitors: *Hores & Pattisson; Courtenay, Croome, & Co.*, agents for *Beale & Martin, Reading; Soames, Edwards, & Jones*, agents for *Cooke, Wokingham.*

(1) 2 J. & Lat. 318.
(2) 3 Beav. 485.
(3) 1 J. & H. 199.
(4) 1 Dr. & Sm. 266.

M. W.

C. A.
1884
PEARSON, J.
Nov. 24.
C. A.
Nov. 26.

HUNT *v.* HUNT.

[1884 H. 4478]

Husband and Wife—Separation Deed—Ward of Court—Custody of Children—Access.

By a deed of separation made in 1880 between *H.*, a medical officer in the army, and his wife, provision was made as to the custody of their four children (of whom the eldest was eleven and the youngest three years of age) during the approaching absence of the husband in *India*, after which he was to resume the entire custody of them, but he covenanted that full and free liberty of access to them should be always accorded to the wife, to the extent at least of her having the opportunity of spending one day in every fortnight with them. In 1884 he was ordered to *Egypt* and proposed to take the first and third of the children with him. Mrs. *H.* applied for an injunction to restrain him from doing so:—

Held by *Pearson*, J., that *H.* was bound by the covenant to keep the children in such a place that Mrs. *H.* could have free access to them, and that an injunction ought to be granted:—

Held by the Court of Appeal, that the covenant did not bind *H.* to keep the children in a place where Mrs. *H.* could conveniently have access to them, and did not preclude him from taking them with him to any place where he might be ordered in the course of his duties, and that the injunction must be dissolved, there being no case made that he was removing them for the purpose of preventing Mrs. *H.* from having access to them.

DR. *J. P. HUNT* and his wife *Emily Anne Hunt* intermarried in 1868. In 1880 she commenced a suit for judicial separation on the ground of cruelty. By indenture dated the 24th of November, 1880 (at which time the parties were residing near *London*), and made between Dr. *Hunt*, therein described as surgeon in the army, of the first part, the wife of the second part, and two trustees of the third part, reciting that differences had arisen between the husband and wife, and that they had agreed to live separately upon the terms thereafter expressed, and that there were four children of the marriage, a daughter aged eleven, and three sons aged respectively seven, five and three, Dr. *Hunt* covenanted with his wife, and as a separate covenant with the trustees, that Mrs. *Hunt* might live apart from him, and that he would not molest her nor seek to compel her to return to

cohabitation, and that he would during the joint lives of himself and Mrs. *Hunt* pay to the trustees for the time being, or to Mrs. *Hunt* directly if they required it, £50 a year at the least, or such greater sum not exceeding £110 a year as should be equivalent to one-sixth of his net income for the time being, with a proviso, which need not be stated, as to his coming into possession of the income of property settled by her, an event which had not happened. Dr. *Hunt* further covenanted with Mrs. *Hunt*, and separately with the trustees, that the four children should within twenty-one days be placed in the care of his sister Miss *E. F. Hunt* of *Rathmines* near *Dublin*, and should remain in her care till Dr. *Hunt* returned from *India*, whither he was about to proceed. That if Mrs. *Hunt* should elect at her own expense to occupy rooms in the house wherein the children should be resident, she should be at liberty to do so, without being considered to be thereby infringing the conditions of the deed. That in the event of the death of Miss *Hunt* during Dr. *Hunt's* absence in *India*, or of her signifying in writing her unwillingness or inability to continue the charge of the children during such absence, Dr. *Hunt* would forthwith communicate with Mrs. *Hunt* and the trustees, and would place the children with some other fit and proper persons to be approved of in writing by Mrs. *Hunt* "until his return from *India*, when he will resume the entire custody of the said children, and that every change of guardianship of the said children that may become necessary or expedient shall in like manner be made with the consent in writing of the said *E. A. Hunt*, and further, that full and free liberty of access to the said children shall be always accorded to the said *E. A. Hunt*, to the extent at the least of her having the opportunity of spending one day in every fortnight with the children, but subject, if necessary and so far as reasonable, to the rules of any school where they may be placed, and that each one of such children may spend six weeks or any less period with the said *E. A. Hunt* at one or at different times in every year as she shall request. And further that the said children shall not without the consent in writing of the said *E. F. Hunt* be removed from the care of the said *E. F. Hunt* during the absence of the said *J. P. Hunt* in *India*. Provided nevertheless that the said children may be

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placed at school in the town where the said *E. F. Hunt* for the time being shall be resident." Then followed covenants by Mrs. *Hunt* and the trustees that she should accept the allowance provided by the deed in full of all demands against the husband, that the trustees would keep Dr. *Hunt* indemnified against her debts, that she should not seek to compel Dr. *Hunt* to return to cohabitation, and that the suit by her for judicial separation should be absolutely determined.

In November, 1884, Dr. *Hunt*, who had returned from *India* after an absence of about a year, was under orders to go to *Egypt* in the course of his duties as army surgeon, and proposed to take with him his daughter, then aged fifteen, and his second son aged nine, and a governess for the daughter. Mrs. *Hunt* then commenced this action claiming an injunction to restrain Dr. *Hunt* from not allowing her to have full and free access to her four infant children or any of them, and from removing such infants or any of them out of the jurisdiction of the Court.

On the 18th of November, 1884, Mr. Justice *Pearson* made an interim order till the 21st, restraining Dr. *Hunt* from taking any of the children out of the jurisdiction, and on the same day refused an application to discharge it. This order was continued till the 24th, and on that day a motion to continue the injunction came on to be disposed of.

Maclean appeared for the Plaintiff.

Dr. *Hunt* argued his case in person. He referred to *Lyons* v. *Blenkin* (1).

The principal part of the discussion took place in Chambers on the application to discharge the interim order.

PEARSON, J. :—

This case is one of a class with which the Court always regrets having to deal, as it must deal with such cases according to strict and rigid rules which do not always meet the circumstances. Such cases can be dealt with *in foro domestico* without any injury

(1) Jac. 265, n.

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to the feelings of the parties, and without bringing into public matters which it is better not to bring forward in that way. The present case is eminently one for a compromise. As however it has come before me, I can only decide on the meaning of the contract according to the best construction I can put upon it. The more I consider it the more convinced I am that the construction which I put upon it when I granted the interim order and afterwards refused to discharge it, is the right one, and is the construction which was intended to be put upon it by the parties when the deed was executed. It appears from the deed that the parties desired to live separate. The husband was then just going to *India*; it was agreed that the children should, until his return, be left behind under the care of his sister, who lived near *Dublin*, and there was a special provision that the wife might not only live in *Dublin*, but might occupy rooms in the house where the children were living, without being considered as thereby infringing the provisions of the deed. Evidently nothing was further from the minds of the parties than that the mother should be separated from the children, or that she should not have free access to them. On the husband's return from *India*, he was to resume the entire custody of the children, and then followed a provision that full and free liberty of access to the children should always be accorded to the wife, to the extent at least of her having the opportunity of spending one day at least in every fortnight with them, but subject to the rules of any school where they might be placed, and that each one of the children might spend six weeks, or any less period in every year, with the wife, as she should request. To my mind, it is quite plain that, not only while the husband was absent in *India*, but after his return, the children were to be so situate that the mother should have free access to them. In my opinion what the husband is now proposing to do would be a breach of his contract, and I continue the injunction until the hearing of the cause or further order.

W. L. C.

C. A.

Dr. *Hunt* appealed, and the appeal came on to be heard by special leave on the 26th of November, 1884.

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Dr. *Hunt*, for the appeal:—

I contend that according to the true construction of the deed I am not bound to keep the children in any particular place. If the mother comes to see them, she is to have access to them. I contracted for nothing more. As to each child spending six weeks with her, I admit that if she wishes to have them I am bound to let them go, but I say that she must arrange for fetching them at her own expense.

Maclean, for the wife:—

I submit that Mr. Justice *Pearson* put a correct construction on the deed. It does indeed contain a provision that after the father's return from *India* he shall resume the entire custody of the children, and if it had stopped there the Plaintiff would have had no case, but that is modified by what follows. There is a provision making the wife's consent necessary to a change of guardianship, which must mean the custody of the children, and this provision must apply after the father's return from *India*, since express provisions had been made for their custody up to that time. Then there is a covenant that the wife shall have free access to the children, and an opportunity of spending with them at least one day in every fortnight. This opportunity is entirely taken away if the father removes them to some distant part of the world where the mother cannot follow them. It cannot have been in contemplation that a woman receiving only the small allowance provided by the deed should take long journeys to see her children.

[FRY, L.J.:—Suppose your construction of the covenant to be correct, will the Court enforce it unless satisfied that it is for the benefit of the children to do so? 36 & 37 Vict. c. 12, s. 2.]

Such a covenant was enforced in *Swift* v. *Swift* (1), and it can hardly be for the benefit of this young lady to be taken to *Egypt* with a father engaged in his professional duties with the army.

BAGGALLAY, L.J.:—

In this case a deed of separation dated the 24th of November, 1880, was executed by Dr. *Hunt* and his wife after proceedings

(1) 4 D. J. & S. 710.

for a judicial separation had been commenced by the wife. The deed appears to be a very reasonable deed having regard to the circumstances. There were four children of the marriage, the eldest of whom, a daughter, was of the age of eleven; the other three were boys. The deed to a great extent follows the ordinary form of a deed of separation, the husband covenants to allow his wife to live separately from him, and to make her an allowance. Then follows a covenant as to the children. Dr. *Hunt*, an officer in the medical service, was going to *India*; it was stipulated that during his absence there the children should be placed in the care of his sister, and it was expressly provided that Mrs. *Hunt* might if she pleased take rooms in the house where they were to be. It is stated by Dr. *Hunt*, and is not disputed, that during his absence in *India* the children were maintained at his expense. There was a provision that if the sister should die or decline to continue the charge of the children during Dr. *Hunt's* absence in *India* the consent of Mrs. *Hunt* should be requisite to their being placed in other custody. This was until Dr. *Hunt's* return from *India*, on the happening of which event Dr. *Hunt* was to "resume the entire custody of the children." It is admitted that, if the deed had stopped there, Dr. *Hunt* would have had sole control over the children, but some reliance was placed on the following clause: that "every change of guardianship of the said children that may become necessary or expedient shall in like manner be made with the consent in writing" of the wife. In my opinion, this clause had no reference to what might happen after Dr. *Hunt's* return from *India;* but, however this may be, it cannot be read as interfering with the right of Dr. *Hunt* to take his children with him, but only to their being placed under the care of some one else. The next clause is more important: "that full and free liberty of access to the said children shall be always accorded to the said *E. A. Hunt*, to the extent, at the least, of her having the opportunity of spending one day in every fortnight with her children." It is to be observed that there is nothing said as to keeping the children in any particular place or as to bringing them to her; it is only stipulated that she shall have free access to them—that is, that she shall have full liberty to come and see them. Then it is further stipulated that each

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of the children may spend six weeks or any less period with Mrs. *Hunt* at one or at different times in every year as she should request. What do these stipulations mean? do they mean that the father shall keep the children at or near the place where Mrs. *Hunt* lives, or do they mean that when the children are with their father at any place to which his duties take him, she, if she wishes to see them, must find her way to them, and, if she wishes to have them stay with her, must provide for their being brought to her? The covenants can hardly be construed so as to impose an obligation on the father to keep the children near her. Suppose the father quartered at *Inverness* and the mother residing at *Penzance*: is he to take the children to her or to keep them within an easy distance from her? She must, in my opinion, provide for their seeing her. The deed describes the husband as a surgeon in the army, and provides for what was to be done during his absence in *India*, whither he was about at once to go, and of course it must have been within the contemplation of the parties that he might be ordered abroad again. In that case was he to keep the children in *England?* The best construction I can put upon the covenant is, that if the wife requires access to the children she must provide the means for it, and that if the father goes to any place to which he is ordered out, and takes the children with him, she must follow them if she wishes to have access to them.

The other branch of this case does not arise, whether if the covenant had borne the construction contended for by Mrs. *Hunt* the Court would have declined to enforce it on the ground that it would not be for the benefit of the children to enforce it.

BOWEN, L.J.:—

In construing the covenant we must bear in mind that the law gives the father the custody of his children, unless he has done something to forfeit his right to it. Whoever seeks to make out that the father has contracted himself out of this right, must, in my opinion, shew a clear bargain to that effect. The case substantially turns on the stipulation that full and free liberty of access to the children shall be accorded to Mrs. *Hunt*. This means, no doubt, that she is always to be allowed to go to the children, and I think it includes this—that Dr. *Hunt* is not to do

anything unreasonably which would prevent her seeing them. Thus, for instance, if he were without sufficient cause to send them to *Australia*, I think the covenant would be broken. The question is, what is according to Mrs. *Hunt* reasonable liberty of access. Dr. *Hunt* is a medical officer in the army; is it unreasonable that he should take his children with him to the place to which he is sent in the discharge of his duties? I think not, and I do not think that by so doing he is precluding the wife from access to them. It is true that, as was urged, it puts a difficulty in the way of her seeing them, but in my opinion it is not an unreasonable difficulty, and I do not think that it is to be inferred from the deed that he was not to be at liberty thus to take them with him.

FRY, L.J.:—

The first question in this case turns on the construction of the deed. It is a deed dealing with the custody of the children of a medical officer in the army. It provides for their custody during his absence in *India*, and then stipulates that on his return he shall resume the entire custody of the children, but this is qualified by a covenant that full and free liberty of access to them shall always be accorded to the wife. I do not think that this covenant interferes with his taking his children with him to any place to which he is sent in the course of his duty. The case of his taking the children away for the purpose of preventing the wife from having access to them does not arise. The deed appears to me only to give the wife a right of access to them where they may happen to be, and to hold that it obliges the husband to keep the children in such a place that she can conveniently have access to them, would create formidable difficulties, for how could it be determined what was the limit of the places to which the husband might take them. It is said that the wife, with the small income provided for her by the deed, cannot travel to a great distance, but that consideration cannot alter the construction of the deed, which, in my opinion, will not bear any construction precluding the father from taking his children with him to any place to which he may be sent in the discharge of his duties.

If we had taken Mrs. *Hunt's* view of the construction of the

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deed the question would have arisen whether, having regard to the benefit of the infants, it ought to be enforced, but this question we have not to consider, as we think that the terms of the covenant do not prohibit Dr. *Hunt* from doing what he proposes.

Solicitors for Plaintiff: *Theodore Allingham & Pearce.*

H. C. J.

C. A. 1885 *Jan.* 12, 21.

In re WHITEHEAD.

Solicitor—Misconduct—Striking off the Roll—Jurisdiction of Court of Appeal.

From the evidence given by a solicitor in an action in the Court of the County Palatine of *Lancaster* he appeared to have been guilty of gross misconduct in his character of solicitor as to one of the mortgages to which the action related. The plaintiffs in the action having appealed, the conduct of the solicitor came under the consideration of the Court of Appeal, who directed the official solicitor to take proceedings. The official solicitor accordingly moved in the Court of Appeal for an order calling on the solicitor to explain his conduct, or that he might be struck off the roll:—

Held, that the Court of Appeal had jurisdiction to entertain the application, although not brought before them by way of appeal.

The solicitor had not taken out his certificate for several years and did not take any notice of the application. The Court, under the special circumstances of the case, did not think fit to strike him off the roll or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the Court.

THIS case arose out of the transactions which formed the subject of *Northern Counties of England Fire Insurance Company* v. *Whipp* (1). The company, in 1878, became legal mortgagees of an estate belonging to *Crabtree,* their manager, which he subsequently, in the same year, mortgaged to Mrs. *Whipp,* delivering over to her all the title deeds relating to the property except the mortgage to the company, suppressing all notice of that mortgage. The company having, in 1880, brought their action for foreclosure, Mrs. *Whipp* counterclaimed to have the security of the company postponed to hers on the ground that the company had been guilty of gross negligence in leaving the title deeds under the control of *Crabtree.*

Mark Whitehead was the solicitor of the company, and as such

(1) 26 Ch. D. 482.

prepared the security from *Crabtree* to the company. At the trial of the action in April, 1882, he was called as a witness on behalf of Mrs. *Whipp*, and was cross-examined on behalf of the company. He deposed that in December, 1878, *Crabtree* brought him the deeds and asked him to hand them to the firm of *Whitehead, Son, & Dodds*, who were to procure him an advance of money. [The Mr. *Whitehead* who was a member of this firm was a different person, *J. Milne Whitehead.*] *Mark Whitehead* in his evidence further stated that he said to *Crabtree* at the time that the company had a mortgage on the property, to which *Crabtree* replied to the effect that he had the authority of the company to mortgage, and that they would postpone their security. *Mark Whitehead* took the deeds to *Whitehead, Son, & Dodds* in December, 1878, and they prepared a draft mortgage from *Crabtree* to Mrs. *Whipp*, which they sent to *Mark Whitehead* to be perused on behalf of *Crabtree*, and he approved of it on *Crabtree's* behalf, and afterwards, along with Mr. *Milne Whitehead*, attested its execution by him. He admitted that he did not tell Mr. *Milne Whitehead* of the mortgage to the company. He also stated that he had not taken out his certificate for nearly three years.

The case came before the Court of Appeal on an appeal from the decision of the Vice-Chancellor of the County Palatine of *Lancaster*, and the attention of the Court being drawn to the conduct of *Mark Whitehead* as appearing on his evidence, the Court directed the official solicitor to take proceedings in the matter.

The official solicitor accordingly caused *Mark Whitehead* to be served with a notice that the Court of Appeal would be moved on behalf of the official solicitor for an order calling upon him to answer the matters contained in certain affidavits and the exhibits thereto, or that his name might be struck off the roll of the solicitors of the Supreme Court on the ground of misconduct as a solicitor disclosed in the affidavits.

The principal exhibit was a verified copy of shorthand notes of the evidence given by *Mark Whitehead* on his examination and cross-examination. There was also an affidavit by Mr. *Milne Whitehead*, stating that *Mark Whitehead* was present when the mortgage to Mrs. *Whipp* was executed and £1500 advanced upon

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it, and also on a subsequent day when the remaining £2000 was advanced upon it. He went on to say that at the time of the mortgage and further advance neither *Crabtree* nor *Mark Whitehead* gave him any notice, and he was wholly unaware, that the property had been mortgaged to the company, or that *Mark Whitehead* was solicitor to the company.

Mark Whitehead did not file any affidavit, nor did any one appear for him.

The motion was heard on the 12th of January, 1885, by *Baggallay*, *Bowen*, and *Fry*, L.JJ.

Stirling, and *Hollams*, for the motion :—

[BAGGALLAY, L.J. :—Is this application properly made to the Court of Appeal ?]

The application was so made in *Wheatley* v. *Bastow* (1) and *Thompson* v. *Finch* (2).

[BAGGALLAY, L.J. :—As matters then stood the Court of Appeal had original jurisdiction.]

We submit that sect. 87 of the *Judicature Act*, 1873, justifies the application by empowering the Court of Appeal to do all it formerly could.

[BAGGALLAY, L.J. :—Does not sect. 18 make the Court of Appeal a distinct Court ?]

We submit that it does not ; sect. 4 makes it a branch of the Supreme Court.

[BOWEN, L.J. :—Can we alter the *status* of a solicitor except as regards our own Court, when the matter does not come before us by way of appeal ?]

Yes. Sect. 87 makes solicitors officers of the Supreme Court, and the Court of Appeal, as a branch of that Court, is expressly authorized by that section to deal with them. There is now only one roll, so that striking a solicitor off it must disqualify him altogether.

[BAGGALLAY, L.J. :—Supposing that we have jurisdiction, it is to be considered whether we ought to exercise it as regards

(1) 7 D. M. & G. 558. (2) 8 D. M. & G. 560.

misconduct which is only brought to our notice incidentally in the course of an appeal.]

We submit that the Court will exercise its jurisdiction according to the principles on which the Court of Appeal acted before the *Judicature Acts*. *Wheatley* v. *Bastow* (1) is very similar to the present case.

[FRY, L.J.:—Supposing we have jurisdiction, ought we to encourage such applications being made to us in the first instance?

BOWEN, L.J.:—Here is a case of misconduct not in an action. Must the application be made to us because we have found out the misconduct? If any one else had found it out the application would have been made to the Queen's Bench Division.]

The Court having found out a *primâ facie* case of misconduct in one of its own officers, calls on him to explain his conduct.

BAGGALLAY, L.J.:—

We all are of opinion that we have jurisdiction, but as there does not appear to be any case in which the Court of Appeal has exercised such a jurisdiction since the *Judicature Acts*, we shall consult the other members of the Court of Appeal before disposing of the case. In the meantime we will hear the merits.

The facts of the case were then stated to the Court.

[BAGGALLAY, L.J.:—What order do you ask?]

We ask the Court to follow the precedents at Common Law: *Re Worman* (2); *In re Wright* (3). The circumstances of misconduct are very strong, though it is right to state that *Mark Whitehead* does not appear to have derived any pecuniary benefit from the transaction; that he is in reduced circumstances, and that he has not taken out his certificate for three years.

1885. Jan. 21. BAGGALLAY, L.J.:—

In the early part of last year an appeal from the County Palatine of *Lancaster* was brought here in the case of *Northern*

(1) 7 D. M. & G. 261, 558. (2) 32 L. J. (Ex.) 83.
(3) 12 C. B. (N.S.) 705.

C. A. 1885 *In re* WHITEHEAD. Baggallay, L.J.

Counties of England Fire Insurance Company v. *Whipp* (1). It was a question between first and second mortgagees, the first mortgagees, who were plaintiffs, asking for foreclosure against the second, the second mortgagee resisting it on the ground that under the circumstances there was negligence on the part of the first mortgagees, by reason of which their security ought to be postponed to that of the defendant. The decision of the Vice-Chancellor of the Duchy was in favour of the defendant, and from that an appeal was brought. On the hearing of that appeal the circumstances were gone into, and the conduct of *Mark Whitehead*, a solicitor employed about the defendant's mortgage, came under the consideration of the Court. The Court thought it right to direct the official solicitor to bring the matter in some way under the consideration of the Court for the purpose of determining what should be done in reference to the conduct of the solicitor. *Mark Whitehead* received a notice to the effect that the Court would be moved on behalf of Mr. *Pemberton*, the official solicitor, for a rule calling upon him to answer the matters contained in certain affidavits and exhibits, and in the alternative to strike him off the rolls. The application came before us for hearing on the first day of the sitting since Christmas, and the Court not being constituted exactly as it had been on the hearing of the appeal, the circumstances were fully gone into. They were as follows:—About the end of November, 1878, an application was made by a person of the name of *Crabtree* to a firm of solicitors, *Whitehead, Son, & Dodds*, in which a Mr. *John Milne Whitehead* was a partner, asking for a loan on the security of certain property. *Mark Whitehead* acted as solicitor for *Crabtree* in the matter of this loan. He was also the solicitor of the *Northern Counties Insurance Company*, of which *Crabtree* was the manager. When the application was made for the loan the value of the property could not be very readily ascertained, and £1500 only was advanced in December, 1878, and a further sum of £2000 in February, 1879; both advances were made by Mrs. *Whipp* through *Whitehead, Son, & Dodds*, her solicitors. The title deeds of the property, apparently in proper form, were taken by *Mark Whitehead* to *Whitehead, Son, & Dodds*, and deposited with them. The

(1) 26 Ch. D. 482.

property had in the early part of 1878 been mortgaged to the *Northern Counties Insurance Company*. *Mark Whitehead* was fully aware of that fact, but throughout the transaction he concealed it from *Whitehead, Son, & Dodds*. Unless some explanation can be offered of the conduct of *Mark Whitehead*, there was as gross a case of misconduct by him in his character of solicitor as can well be imagined. *Mark Whitehead* has not thought fit to answer the affidavits, or in any way to explain the matter. I think it is a case in which, if the Court thought fit to exercise its jurisdiction to the extreme extent, *Mark Whitehead* should be struck off the roll. But the Court is disposed to take into consideration that it is perhaps owing to negligence only that he has not answered the affidavits, and also the fact that there is no appeal from this Court; there is also this further circumstance, which I think very material, that the transaction took place six years ago, and that for several years past *Mark Whitehead* has not taken out his certificate. Under these circumstances we propose not to strike *Mark Whitehead* off the roll, nor to make an order of suspension for a shorter or longer period, but to issue an injunction restraining him from renewing his certificate without the leave of the Court. If he desires to renew his certificate, and is able to explain the matters which now appear to be against him, he can apply to the Court for leave to renew it, and the application will receive full consideration. We think this will meet the justice of the case, and be a sufficient protection to the public. The order will be served upon him; notice of it must also be given in the proper form to the parties to whom the application for the renewal of the certificate would have to be made.

BOWEN, L.J.:—

I am of the same opinion, and have nothing to add.

FRY, L.J.:—

I have nothing to add.

Solicitor: *The Official Solicitor.*

H. C. J.

V.-C. B.
1884
Nov. 26, 27.

In re GLAMORGANSHIRE BANKING COMPANY.

MORGAN'S CASE.

Company—Reconstruction—Right of dissentient Member to inspect before going into Arbitration—Companies Act, 1862, *ss.* 161, 162 [*Revised Ed. Statutes, vol. xiv., p.* 237].

A banking company being in the course of voluntary winding-up for the purpose of reconstruction, one of the members having been, with the others, offered 5*s.* in the pound for her holding in the old company, gave notice to arbitrate under the 161st section, as a dissentient. She then claimed the right to examine the books of the company in order to see whether it would be better for her to accept the offer of 5*s.* or go on with the arbitration.

Application refused, with costs of adjournment into Court.

IN the year 1877, the *Glamorganshire Banking Company* was registered under the *Companies Acts*, 1862 and 1867, as a company with unlimited liability, having its regulations contained in a deed of settlement dated the 13th of July, 1877. This deed contained clauses usual in deeds of settlement of banking companies, forbidding the inspection of customers' accounts by shareholders or creditors.

In the year 1882 the company was registered with limited liability with a capital of £2,000,000 in 50,000 shares of £40 each.

Of these 35,190 had been issued, and the sum of £10 per share paid in respect of 30,000 shares, and of £7 10*s.* in respect of the remaining 5190, making the paid-up capital altogether £338,925.

At two meetings of shareholders, held respectively on the 10th and 26th of March, 1884, special resolutions were passed and confirmed that it was desirable to reconstruct the company under sect. 161 of the *Companies Act*, 1862, and that, with a view thereto, the company be wound up voluntarily, and that *John Henry Rowland* and *Thomas Dryslwyn Griffiths* be appointed joint liquidators for the purpose of such winding-up; that the liquidators be authorized to consent to the registration of a new company to be named "*The Glamorganshire Banking Company*,

Limited;" and that a draft agreement submitted to the meeting, and expressed to be made between the old company and its liquidators of the one part, and the new company of the other part, be approved: with other subsidiary matters.

By this draft agreement, after reciting as above, and that the new company had been incorporated with a nominal capital of £1,750,000, in 50,000 shares of £30 each, and 50,000 of £5 each, and that by the articles of association it was provided that the £5 shares should be preference shares, and the £30 shares ordinary shares, and (after certain directions as to the dividends on the two classes of shares) that surplus profits should belong to the preference and ordinary shareholders rateably in proportion to the amounts paid up or credited as paid up on the shares; it was witnessed that the old company agreed to sell, and the new company agreed to buy, the assets and property, real and personal, of the old company, the new company to pay the debts and liabilities of the old company, and indemnify its liquidators; every member of the old company to be entitled, in respect of each share on which £10 had been paid up, to have allotted to him one £30 share in the new company with the sum of £2 10*s.* credited as paid up, and in respect of each share on which £7 10*s.* had been paid up, to have allotted to him one £30 share in the new company with the sum of £1 17*s.* 6*d.* credited as paid up; if the liquidators should, in order to carry the said rule into effect, have occasion to purchase the interest of any member of the old company, then the new company to be relieved from the above obligation as regarded such member, but to pay to the liquidators, for the purpose of effecting such purchase, a sum to be fixed by arbitration between the old company and such member, or by agreement between him and the liquidators, as the price payable for such purchase; and the liquidators, for the sums so payable, to have a charge on the premises so agreed to be sold, with other minor provisions.

On the 27th of March the above agreement was executed.

The above mentioned 35,190 shares were held by 387 different persons, of whom fifteen only gave notice of their dissent. Out of these fifteen the interests of nine had been purchased by the liquidators at the rate of 5*s.* in the pound, leaving six, holding

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amongst them 377 shares, with a total of £3292 10*s.* paid up thereon, whose interests had not been purchased.

Amongst these six was a Mrs. *Morgan*, who was the holder of 150 shares on which £10 had been paid up, and of 90 shares, on which £7 10*s.* had been paid up, making together £2175.

On the 28th of March, 1884, Mrs. *Morgan's* solicitor wrote to the liquidators as follows:—"I hereby give you notice that Mrs. *Elizabeth Morgan*, of &c., dissents from the special resolutions passed at the general meetings of the above company held on the 10th and 26th days of March instant, and also that she requires you either to abstain from carrying such resolutions into effect, or to purchase the interest held by her in the said company, at a price to be determined in accordance with the provisions of the *Companies Act*, 1862."

On the 16th of April, the liquidators' solicitor wrote to say the liquidators were prepared to purchase Mr. *Morgan's* £10 paid-up shares for £2 10*s.* each, and her £7 10*s.* paid-up shares for £1 17*s.* 6*d.* each, in other words, of purchasing her interest at the rate of 5*s.* in the pound.

In answer to this Mrs. *Morgan's* solicitor on the 24th of April wrote to say that the price offered for Mrs. *Morgan's* shares "will not be accepted, and unless an increased offer is made by the liquidators and accepted, the price must be settled by arbitration."

A correspondence followed, in the course of which the liquidators' solicitor on the 5th of May said, that the liquidators were unable to increase their offer, and on the 4th of July, that they were satisfied the offer made was sufficient.

On the 11th of July Mrs. *Morgan's* solicitor wrote to ask "whether the liquidators are prepared to allow the books and securities of the company to be inspected by some one on behalf of Mrs. *Morgan*, for the purpose of advising her whether the offer of the liquidators is sufficient or not."

The liquidators' solicitor on the 16th of July wrote to say, the liquidators must decline to produce the books for inspection; whereupon on the 29th of July the present summons was taken out on behalf of Mrs. *Morgan*, "that the said liquidators may be ordered to produce to her, or to her solicitors, or to some other person to be named by her, all books, accounts, statements, and

returns, reports, and other documents, in their custody or control, containing entries or information relative to the assets of the said bank at the date of the resolution to wind up the company, or to the value of such assets."

Since the date of the above notice, namely on the 5th of November, 1884, the liquidators gave notice to arbitrate, and on the 25th of November, 1884, Mrs. *Morgan* gave notice to the liquidators of the appointment by her of an arbitrator.

It appeared that the books had been handed over to the new company.

On the 15th of November the Chief Clerk said he should make an order as asked on the summons, and, at the request of the liquidators, the summons was adjourned into Court.

Millar, Q.C., and *Kirby*, for the summons:—

Before we go into arbitration we ask to be enabled to find out the value of what we are buying. Mrs. *Morgan* is a member of a partnership which is being wound up, and as such is entitled to know whether she is selling her share in the partnership at a fair price. The Court has a discretionary power under sect. 156. In *In re Birmingham Banking Company* (1) *Romilly*, M.R., made an order for inspection, notwithstanding a secrecy clause in the articles of association.

Marten, Q.C., and *J. T. Prior*, for the liquidators:—

As a matter of fact, all these books and papers have been handed over to the new company, so that an order would lead to the greatest inconvenience. The secrecy clauses of the deed of settlement have direct application and are binding on the applicant, as much as upon every other member. There is a direct prohibition; and this is a going concern, not a concern that is being wound up for the purpose of coming to an end.

This is an afterthought. The applicant on the 24th of April, decided upon arbitration, and not until the 11th of July did she apply for inspection—a very convenient screw for raising the price of the shares. The applicant is one of six dissentients, holding between them 377 shares representing only £3292 10*s*.

(1) 36 L. J. (Ch.) 150.

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out of 35,190 shares, representing £338,925—that is to say, less than 1 per cent. of the whole paid-up capital.

After the confirmation on the 26th of March of the resolution, the applicant ceased to be a shareholder under sect. 156; she became a vendor (sect. 161), and has no other rights than those of an unpaid vendor under sect. 162. She gets the indemnity of the new company.

The only clause in the Act of 1862 about production is clause 156; and in the very case cited of *In re Birmingham Banking Company* (1), Lord *Romilly* said: "The object of the 156th section was to prevent a vexatious inspection." Neither that case, nor that of the *Joint Stock Discount Company* reported along with it, were cases of voluntary winding up; both companies were being wound up compulsorily. In the *Birmingham Banking Company's* case there was no suggestion that the business of the company was being carried on. To a going concern like the present secrecy is essential. The point was expressly taken and decided by Lord *Romilly* in *Ex parte Davis* (2). In *In re Imperial Mercantile Credit Association* (3) your Lordship held that in a reconstruction scheme a dissentient shareholder could not insist on the accounts being brought in and passed.

Moreover, the applicant is bound, and cannot assert any right inconsistent with the transfer of this business as a going concern. She cannot say, "I will take my money in such a way as will deprive you of the mode of realizing the assets according to your view of what is most beneficial for yourselves": *per* Sir *W. M. James*, L.J., in *Ex parte Poole's Executors* (4). The liquidators are in the position of receivers and managers; they are bound to afford equal facilities, and not to make discovery at the instance of either party: *Gooch's Case* (5); *In re Mutual Society* (6).

Millar, in reply:—

As to the greater part of the argument on the other side, we have not a word of objection. The applicant's notice of dissent was sent on the 28th of March; the letter of the 24th of April

(1) 36 L. J. (Ch.) 150.
(2) 16 W. R. 668.
(3) Law Rep. 12 Eq. 504, 515.
(4) Law Rep. 8 Ch. 702, 709.
(5) Ibid. 7 Ch. 207.
(6) 22 Ch. D. 714.

was merely an intimation that if we could not agree as to price we should be driven into arbitration. We do not argue that the transfer was not effectual; we admit that all that has been done has been rightly done; the simple question is whether, compelled, as the applicant is, to go into arbitration, she is to go in "blindfold," as your Lordship observed in the case of Sir *Trevor Lawrence* in *In re Imperial Mercantile Credit Association* (1).

BACON, V.C.:—

In my opinion the issue which has come before me for decision is an extremely simple one. [His Lordship read the summons, and continued:—] The answer to that first of all is: "In point of fact we have no such documents and we have no power to produce any such documents." Mr. *Millar* agrees that all that has been done under the Act of Parliament in the voluntary winding-up, and in the transfer to the new company, has been regularly done, and he raises no objection about that, nor does he suggest that there exists any document, or that upon the production of any document any result will be arrived at, which will shew upon the arbitration that he is entitled to more than has been offered. The consequence of acceding to such an application as this would probably be very serious to the new company; but I am relieved from considering that, because I find that, under the provisions of the Winding-up Act, the company have agreed to transfer the whole of their affairs to a new company, not by way of sale, but in order to reconstruct for the benefit of such of the shareholders as are so inclined, the company of which the present applicant and they were members. Their number I need not refer to particularly, but the number of dissentients is reduced to six out of several hundreds.

If a case were presented to the Court in which fraud was suggested, or inaccuracy was at all pointed out, or even hinted at, the Court would have to exercise that discretion which is reposed in it and do its best to see that justice was being done between the parties. But in this case the facts agreed to are clear and plain. All that has been done has been done regularly. All the members of the old company except six have agreed to

(1) Law Rep. 12 Eq. 504, 513.

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that which has been done. The company's books including all its accounts and papers have been handed over by the old company's liquidators to the possession of the new company. There is no means by which the order which is asked for here can be enforced. The answer of the liquidators is, we have no such books, we have no such accounts.

But inasmuch as the applicant in a letter, the terms of which are not to be cavilled at or construed otherwise than in accordance with what they plainly express, on the 24th of April, said "You offer me 5*s.*; I am not satisfied with that; unless you increase your offer I will go to arbitration," I think the determination to arbitrate was chosen and adopted by the applicant on that 24th of April. The arbitrators have since been named, and the arbitration is pending. Mr. *Millar* says (and he quotes some words from a judgment of mine in a case in which Sir *Trevor Lawrence* was the applicant) that it is not reasonable he should be sent blindfold into this arbitration. No man is sent blindfold to an arbitration. The *Companies Clauses Act* provides for an elaborate system of arbitration. If the directions of that Act are complied with, it cannot be said that there is any blindfolding. The liquidators who are parties to this arbitration have to make out before the arbitrators that the 5*s.* offered was as much as ought to have been offered. So far from being blindfolded, the present applicant puts them to the proof—the onus is upon the liquidators to shew that the offer made was a fair offer. The applicant has power under the arbitration clauses of the Act of Parliament, and even without them, to examine the liquidators and obtain statements from them if they cannot produce documents. It has never been suggested that the present applicant is under any disability—any want of knowledge—or any want of proof of that which is necessary for her to know in order to establish her claim that she is entitled to more than 5*s.*—for that is her claim, and her only claim. There has not been a word said upon that subject.

The application dealing with this peculiar subject is different from that in the *Birmingham Bank Case* (1), and others, where the thing had come to an end, and where the secrecy clause was

(1) 36 L. J. (Ch.) 150.

resorted to, and resorted to in vain. That is not so here. The current accounts which the customers had with the old bank are carried on into the new bank, and the applicant desires to look into those accounts and see what is their condition—not even by herself, because she cannot do it, but her solicitor or agent is to be let in to examine the circumstances of the several customers in the accounts before the transfer. The terms of the summons are open to no kind of limitation. They are to produce everything in the world relating to the assets of the company. There never was a case in which any such application was entertained by this Court. The Act of Parliament has with the utmost caution provided for the state of circumstances now before me. It has given to any dissentient shareholder who does not accept the proceedings adopted by the majority of the shareholders the right to go to arbitration. He goes to arbitration with all the powers contained in the Act of 1862, and with all the powers contained in the *Common Law Procedure Act.* What may be the result of the arbitration I cannot at the present moment anticipate, but there are means provided by the law to enable the applicant, who last April chose to go to arbitration, to go to that arbitration safely, and with the means of getting the fullest information she is entitled to. In my judgment, no reason has been suggested, nor has any word of proof or argument been adduced to lead me to believe that there is any necessity for that production which is asked for by this summons. Therefore I must dismiss it.

As to the costs, after some discussion, his Lordship said he thought the costs of the adjournment into Court was as much as he ought to give.

Solicitors: *Nicholl Morgan; William Voss.*

J. B. D.

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Jan. 30.

COTTRELL *v.* COTTRELL.

[1871. C. 176.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 34—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 74 [*Revised Ed. Statutes, vol. ix., p.* 644]—*Purchase-money of Lands subsequent to beneficial Lease—Tenant for Life and Remainderman—Application of Income.*

Sects. 34 of the *Settled Land Act*, 1882, and 74 of the *Lands Clauses Consolidation Act*, 1845, are similar enactments, so that where the facts are similar decisions on sect. 74 are authorities on sect. 34.

As between tenant for life and remainderman, where lands subject to a beneficial lease are sold under the *Settled Land Act*, 1882, the tenant for life will, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase-moneys as equals the rents under the lease, and the rest of that income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired.

In re Mette's Estate (1), *In re Wootton's Estate* (2), and *In re Wilkes' Estate* (3) approved.

PETITION.

Charles Augustus Tulk, who died on the 16th of January, 1849, by his will, dated in September, 1848, devised to trustees in fee certain messuages and hereditaments in and near *Leicester Square* (now part of the site of the *Alhambra Theatre*) upon trust (subject to certain provisions for paying off a mortgage out of the rents thereof) to pay the rents and profits of such hereditaments to his daughter, the petitioner, *Sophia Augusta Cottrell*, then the wife of *Henry Cottrell*, during her life, for her separate use, without power of anticipation, and after her death in trust for such of her children as being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common in fee.

In the month of March, 1884, these hereditaments were sold under the provisions of the *Settled Land Act*, 1882, to the *Alhambra Company* for £10,000, which sum was invested by the trustees in the purchase of £9919 7*s.* 1*d.*, £3 per cent. Annuities, so as to produce an income of £294 or thereabouts. At the time

(1) Law Rep. 7 Eq. 72. (2) Law Rep. 1 Eq. 589.
(3) 16 Ch. D. 597.

of the sale the hereditaments sold were subject to a lease for sixty years from the 19th day of July, 1851, at the annual rent of £200.

The testator's daughter, *Sophia Augusta Cottrell*, was now a widow of sixty years of age, her husband having died in 1871. She had three children, a son of thirty-four years of age, and two daughters, one of twenty-six, and the other of twenty years of age. Since her husband's death in 1871 she had out of her income maintained her elder daughter until the marriage of such daughter in 1878, and had maintained and was still maintaining her younger daughter. She had also, according to the evidence, maintained her son, and had paid a considerable sum for his advancement. She now presented a petition in an action in which a decree had been made for carrying into execution the trusts of the will, praying that the trustees might be ordered to pay the whole income of the investment arising from the purchase-moneys to her during her life.

Hastings, Q.C., and *Levett*, for the Petitioner:—

Under the 34th section of the *Settled Land Act*, 1882, the Court has full discretion to allow the tenant for life the whole income of the invested purchase-moneys, and it is submitted that this is a proper case in which to allow the Petitioner, who has maintained her children, and paid out of her income over £800 for starting her son in life, the whole income of the fund.

KAY, J.:—I do not think that is a circumstance which can be taken into consideration.

Kekewich, Q.C., and *A. Hind*, for the remainderman:—

The 34th section of the *Settled Land Act* is obviously taken from the 37th section of the *Settled Estates Act*, 1877, the only difference between the two being the introduction into the 34th section of a discretionary power to the trustees; and that 37th section again is substantially identical with the 74th section of the *Lands Clauses Consolidation Act*, 1845.

The 74th section is accordingly *in pari materiâ* with the 34th, and upon the former it has been decided that where settled land,

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subject to a beneficial lease (such as this) is purchased or taken, the tenant for life is only entitled during the continuance of the term to so much of the income of the purchase-moneys when invested as equals the amount of the rents he would have received in case the land had not been purchased or taken, and that the rest of the income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired: *In re Wootton's Estate* (1); *In re Mette's Estate* (2); *In re Wilkes' Estate* (3). These authorities therefore govern the present case.

[They also referred to *Browne and Theobald's* Law of Railways (4); *Wolstenholme and Turner's Settled Land Act* (5).

Northmore Lawrence, for the trustees.

Hastings, in reply:—

In all the cases cited the lands were taken compulsorily under the *Lands Clauses Consolidation Act*, 1845, probably realising very high prices. This is a sale under a different Act, containing extended discretionary powers, upon which there is no authority. So that the Court may exercise its discretion according to its own judgment without having regard to what other Judges may have decided on another Act.

KAY, J.:—

I am told this is the first case that has arisen upon the 34th section of the *Settled Land Act*, 1882. By the 21st section of that Act capital money arising under the Act is to be invested on Government or other securities therein mentioned; and by sect. 22, sub-sect. 6, "the income of those securities shall be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement." If the Act had stopped there, there would have been no discretion in the Court or in anybody; but sect. 34 provides that "where capital money arising under this Act is purchase-money paid in respect of a lease for years . . . or in respect of a reversion dependent on any such lease . . . the trustees of the settlement or the Court, as

(1) Law Rep. 1 Eq. 589.
(2) Ibid. 7 Eq. 72.
(3) 16 Ch. D. 597.
(4) Page 192.
(5) Page 47.

the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease . . . or reversion in respect whereof the money was paid, or as near thereto as may be."

Then I turn to the 74th section of the *Lands Clauses Consolidation Act*, 1845, and I find that the words there are substantially identical. That section provides that where any purchase-money paid into the bank under the Act shall have been paid in respect of any lease for years, or of any reversion dependent on any such lease, it shall be lawful for the Court of Chancery "on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be."

Therefore the 34th section of the *Settled Land Act* was apparently copied almost word for word from the 74th section of the *Lands Clauses Act*, 1845. And in my view the meaning of the section is this—Where the tenant for life sells, the capital money is to be invested in the names of the trustees, and *primâ facie* the income of that investment is to be paid to the tenant for life. But it is obvious that there may be cases where that would be extremely unfair as between the tenant for life and remainderman. Suppose, for instance, that a property was sold subject to a lease for a term yielding only a nominal rent, to allow the tenant for life the whole income of the investment of the purchase-money would be manifestly absurd. Accordingly one of the objects of sect. 34 is to give to the trustees or the Court a discretion to put the tenant for life and remainderman as nearly as may be in the same relative position as if there had been no sale.

It is said that one inducement to a tenant for life to sell is

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that he may increase his income by so doing, and it may well be that in the case of agricultural land the Court or the trustees would not be bound to inquire too nicely whether the invested fund produced a larger income than the land or not. Everybody knows that agricultural land has not produced more than 2½ per cent. for years past, and in a case of that kind the trustees or the Court might be justified in giving all the income of the investment to the tenant for life although such income might be greater than the actual rents. But when the property sold is property in *Leicester Square*, which was let in 1851 for sixty years for £200 a year, a rental that may have been a rack rental then, it is quite clear from one's own observation that the value of property in such a situation must have greatly increased since 1851.

It is pretty obvious, even if I did not look at the other facts of the case, that what would be a rack-rent in 1851 would not be a rack-rent in 1882. Therefore I should infer, apart from the facts, that the £200 for which the property was let in 1851, upon a lease which does not expire till 1911, by no means represents the rack-rent value of the property now. But that is made certain to my mind by the fact that the price paid for the property was £10,000, the income of which sum when invested in 3 per cents. is actually £294, that is to say, very nearly one-third more than the rent reserved by the lease. So it is certain that the lease was not at the time of the sale at a rack-rent, *i.e.*, at the best rent that could have been then obtained, but was a beneficial lease. What does that mean? It means that the reversion is valuable. Accordingly the purchase-money represents the value of that reversion rather than the value of the property the rack-rent of which was £200 a year. So if I allow the Petitioner to receive the full income I should be allowing the tenant for life to receive a considerable part of that reversion, and so giving her an advantage over the remainderman to which she is not entitled. It is said that by reason of the sale the tenant for life is deprived of her chance of reaping the benefit which would accrue to her in case at any time the lease should be surrendered. But I have inquired whether there is any probability that a lease of this nature would be surrendered, and I find that there is not. Supposing again the owner of the lease became bankrupt, and the trustee in bankruptcy had to exercise his power of election, it is obvious

that he would elect to keep it. It would be a valuable asset, and the trustee would sell and get a considerable sum of money for it. Accordingly the chance of the tenant for life ever getting more than £200 a year is practically hopeless.

Under these circumstances, therefore, I do not see why I should not apply to this case the rule which has been applied in cases which I cannot distinguish from the present. For instance, the case of *In re Mette's Estate* (1), there by the will of a testator, who died in 1838, land was devised to a tenant for life, with remainder over in fee. In 1859 the tenant for life and remainderman concurred in demising part of the property for twenty-one years at what was then a rack-rent of £84. In 1868 the demised property was taken by the Metropolitan Board of Works and the purchase-money (which when invested would give £200 a year), was paid into Court under the provisions of the *Lands Clauses Consolidation Act*, 1845. These facts are almost identical with the facts in the case before me, and this was a case under the corresponding sect. 74 of the *Lands Clauses Act*. It was held by Lord *Romilly*, M.R., that the tenant for life was only entitled to £84 a year during the residue of the term, and that the surplus income during that time must be accumulated. The Master of the Rolls then went on to say if the tenant for life outlived the term he would then be entitled to the whole income including the income arising from the accumulations; the accumulations being thus treated as an accretion to the original fund. That seems to me to be a very just order; and that case is consistent with *In re Wootton's Estate* (2), and *In re Wilkes' Estate* (3). I think I ought to follow those cases, and I confess my own judgment goes entirely with those decisions when I come to consider them, because I cannot treat this as a sale of land which was at the time of the sale let at its full value. The order will accordingly be that the Petitioner is only to be paid £200 a year out of the fund arising from the sale of the property during the residue of the term, and that the rest of the income during that term must be accumulated and invested.

Solicitors: *Ley & Lake.*

(1) Law Rep. 7 Eq. 72. (2) Law Rep. 1 Eq. 589.
(3) 16 Ch. D. 597.

W. W. K.

CHITTY, J.

1884

July 19, 26; *Oct.* 29.

In re ORIENTAL BANK CORPORATION. *Ex parte* GUILLEMIN.

Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 84, 153 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 235]—*Right of Proof—Notice.*

In consideration of moneys paid in at a distant foreign branch of a banking company whose head office was in *London*, drafts on the head office were given after presentation of a petition to wind up the company, and appointment of a provisional liquidator in *England*, but before (from want of direct telegraphic communication) any notice of the stoppage of the bank in *London* had been received at the foreign branch, and before the date of the winding-up order :—

Held, that the contract which was entered into by the officers of the foreign branch on behalf of the company without any notice of the winding-up proceedings, and therefore before revocation of their authority, was not invalidated by the *Companies Act*, 1862, s. 153; and accordingly that the creditors in respect of such transaction were not entitled to have their money refunded as on the footing of a void transaction, but merely to prove for the amount under the winding-up *pari passu* with the other creditors.

As between the holders for value of the drafts and the persons by whom the consideration was paid, the holders were held entitled to prove.

ADJOURNED SUMMONS, on the application of *Guillemin, Mesnil, & Collard*, and the *Société Générale de Paris*, that the official liquidator of the *Oriental Bank Corporation* might be ordered "to pay to the *Société Generale de Paris*, or to the applicants, the sum of £250 and interest, which sum was paid to the *Mauritius* branch of the company on the 8th of May, 1884, by *Guillemin, Mesnil, & Collard*, and in return for which the branch delivered to them two drafts for £200 and £50 respectively, drawn by the *Mauritius* branch on the 8th and 10th of May on the head office in *London*, and of which drafts the *Société* were holders for value; and to have the rights of the applicants respectively in respect of such transactions as against the corporation and its estate in liquidation declared, and in particular whether they were entitled to immediate payment in full, or to prove for the amount in the liquidation."

The *Oriental Bank Corporation* was a company registered under the *Companies Act*, 1862, having its head office in *London*, and various foreign branches, of which one was at *Mauritius*.

On the 3rd of May, 1884, the *Oriental Bank*, which had its domicil and head office in *London*, stopped payment here, and a petition to wind up was presented.

On the same day a provisional liquidator was appointed, his powers being limited to taking possession of and protecting the assets of the business; no power being given to him to carry on the business.

On the 6th of May the petition was advertised in the *London Gazette* pursuant to the General Orders, and on the 15th the order to wind up was made.

There being no telegraphic communication between *England* and the *Mauritius*, leave was given on the 3rd of May to the provisional liquidator to send an officer of the bank from *Durban* to the *Mauritius* by special steamer, to convey to the officers of the bank there information of the presentation of the petition and of the appointment of a provisional liquidator. An order to this effect was drawn up and dated the 5th of May. On the 14th of May the special messenger reached the *Mauritius*, and gave the first announcement to the officers of the branch bank of the stoppage of the head office in *London*, presentation of the petition, advertisement in the *Gazette*, and appointment of the liquidator. Up to that time the business of the bank at the *Mauritius* had been carried on as usual, and large sums of money, amounting, it was stated, to a quarter of a million, were paid in and out in the ordinary course of business and *bonâ fide*. Among these transactions were the two to which this summons related.

On the 8th of May, 1884, Messrs. *Guillemin, Mesnil, & Collard* paid into the *Mauritius* branch of the bank £250, and received in exchange two drafts on the head office in *London* for £200 and £50, of which the *Société Générale* were holders as recited in the summons.

Romer, Q.C., and *Northmore Lawrence*, in support of the summons:—

The only course which this Court can adopt is to order the money which was paid into the *Mauritius* branch without notice of the stoppage in *London*, to be refunded. The official liquidator must elect either to adopt or to repudiate the transaction. If

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he adopts it, then it will be treated as a carrying on of the business by the official liquidator on his behalf, and we shall be entitled to payment in full. If, however, he repudiates it, he must do so altogether, and refund the money so as to place us in the position we were in before we paid the consideration for the drafts. Sect. 153 of the *Companies Act*, 1862, will be relied upon by the official liquidator in support of his contention that he can compel us to come in and prove, as if we had been dealing with the company with knowledge of the presentation of the petition. But the acceptance of the bills before any notice of the stoppage and commencement of the winding-up proceedings, was not a disposition of the property of the company under sect. 153: *Bolognesi's Case* (1). The change in the conduct of the business effected by the commencement of the winding-up, which at once put an end to the powers of the directors and of which we had no notice, entitles us to say that the transaction is null and void: *Boulton* v. *Jones* (2); and to recover from the official liquidator the money which we paid in ignorance of the real state of affairs, and under the belief that we were dealing with a going company: *Ex parte James* (3).

Macnaghten, Q.C., and *William Latham*, for the Official Liquidator:—

The applicants are only entitled to prove as ordinary creditors of the company. We rely on sect. 153, which gives the Court power to confirm all transactions *bonâ fide* entered into with a company between the presentation of the petition and the order for winding-up, in the belief that the company was a going concern: *In re Wiltshire Iron Company* (4). Otherwise it would be impossible to know whether you were safely dealing with them or not. The Court is bound to have regard to all the circumstances; and, in order to meet the case of a bank carrying on business in this way, recourse must be had to both sect. 87 and sect. 153, and by reading these sections together to postdate the commencement of the winding-up (when by sect. 84 the powers of the directors cease) until the day when the order for winding-up

(1) Law Rep. 5 Ch. 567.
(2) 2 H. & N. 564.
(3) Law Rep. 9 Ch. 609.
(4) Ibid. 3 Ch. 443.

was made (15th of May). In this case the matter at the time of the winding-up order rested only in contract, and the applicants must be left to their remedy as general creditors of the company: see per *Cairns*, L.J. (1). They have no right to apply by summons, and should have asked for leave to bring an action against the liquidator upon such terms as the Court may think fit to impose. As to a return of the money, it was not ear-marked and cannot be recovered *in specie*. It is a mere debt provable against the company, and by virtue of sect. 10 of the *Judicature Act*, 1875, is subject to the rules of proof in bankruptcy. And as the effect of the *Bankruptcy Act*, 1883, sects. 37 (2) and 49 (3), is that debts incurred without notice of any act of bankruptcy between the act of bankruptcy and the receiving order (which is equivalent to the winding-up order) would be provable in bankruptcy, this debt is provable in the winding-up and gives the creditor no right over other creditors to payment in full.

Romer, in reply:—

The *Bankruptcy Act*, 1883, has no application. Sect. 49, which fixes the date of the receiving order as the time up to which *bonâ fide* transactions without notice are protected, in itself shews that proof of debts under a winding-up cannot be regarded for all purposes as the same thing and subject to the same rules as proof of debt in bankruptcy. By sect. 98 of the *Companies Act*, 1862, after an order for winding-up has been made, the assets of the company are to be collected and applied in discharge of its liabilities as they exist at the date of the winding-up: *Buckley's* Companies Act (2); the general principle being that you cannot prove in a winding-up unless you can shew that at the commencement (*i.e.* the presentation of the petition for winding-up) a right of proof existed. And in the face of the Act (sect. 84) the date fixed by the Legislature for the commencement cannot be altered by the Court.

Oct. 29. CHITTY, J., after stating the facts, said:—

The difficulty in the case arises from the absence of any express enactment in the *Companies Act*, 1862, directly bearing on the circumstances of the case. The *Companies Act*, 1862, does not

(1) Law Rep. 3 Ch. 446. (2) 4th Ed. p. 250.

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contain any provisions corresponding in terms with those contained in the *Bankruptcy Act*, 1883, sect. 37, sub-sects. 2 and 3, and sect. 49, the effect of which is to allow a creditor not having notice of any available act of bankruptcy to prove for a debt contracted prior to the date of the receiving order, and to protect *bonâ fide* transactions entered into before the date of the receiving order without notice of any available act of bankruptcy. The most important provisions in the *Companies Act*, 1862, bearing on the question are sects. 84 and 153. Sect. 84 enacts that a winding-up by the Court shall be deemed to commence at the time of the presentation of the petition, but the section does not state what consequences are to follow from the enactment. These consequences are to be gathered from the other provisions of the Act. The language of sect. 84 being precise, I am unable to accede to an argument adduced on behalf of the liquidator that the commencement of the winding-up, so far as regards the transactions in the *Mauritius*, should be postdated, and to hold that as to those transactions the winding-up ought to be deemed to commence from the 14th of May. Sect. 153 avoids "all dispositions of the property, effects, and things in action of the company" made between the commencement of the winding-up and the order for winding-up, unless the Court otherwise orders. The section deals only with dispositions of property, and does not mention contracts. The case before me is one, not of disposition of property, but of contract only.

There is a plain distinction with regard to the powers of the directors as to carrying on business and otherwise, between a winding-up by the Court and a voluntary winding-up.

By sect. 133 (5) all the powers of the directors cease upon the appointment of liquidators in a voluntary winding-up, including of course their power to enter into contracts on the company's behalf. But the Act does not contain any corresponding enactment with reference to the presentation of a petition for winding-up by the Court. If it were otherwise the mere presentation of a petition, however ill founded, would *ipso facto* paralyse the business of the company and effectually work its ruin. As was said by Lord *Cairns* in *In re Wiltshire Iron Company* (1), sect. 153 contains a wholesome and necessary provision to prevent,

(1) Law Rep. 3 Ch. 446.

during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*. In his judgment in that case he states that if before the winding-up order is made there is no change or disposition of property, but the matter still continues in contract open and executory, sect. 153 has no application. As that case originally stood upon the evidence, *Pearson*, after the presentation of the petition but without notice of it, contracted to buy iron of the company, and paid the price, but the iron was not delivered to him, nor did the property in it pass to him before the winding-up order was made; and in these circumstances it was held that inasmuch as the contract was incomplete and rested on contract only, he was not entitled to an order for the delivery of the iron, but had merely a right of proof. On further evidence being subsequently adduced it was held that the property in the iron had passed to him as purchaser before the order to wind up had been made. And it was then held that the transaction being complete as a disposition of property, the Court ought, under the discretionary power conferred by sect. 153, to confirm the transaction. This is an important authority on the construction of sect. 153, and shews that dispositions of property only are affected by the section, and that contracts are left untouched. The decision in *Bolognesi's Case* (1), cited on behalf of the applicants, for the purpose of shewing that the bills in question were void, has no bearing on the case before me. That was a case under a voluntary winding-up, and the decision was based expressly on sect. 133 (5). The bill there was not the bill of the company, because the powers of the directors had ceased.

The business of the bank at the *Mauritius* during the interval between the 3rd and the 14th of May was not, in fact, carried on on behalf of the liquidator, nor ought it by any fiction in law to be deemed to have been carried on on his behalf, for the provisional liquidator had no power to carry on business. The money paid into the bank by the payees of the bills was not, in fact, received by him, or on his behalf, or by his authority; it was not earmarked. Having regard to the magnitude of the transactions that took place, and to the circumstance that the balance of the

(1) Law Rep. 5 Ch. 567.

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transactions was against the bank—more money having been paid out than paid in—the reasonable inference is that the money has been paid away. Certainly it is not shewn that the money paid in reached, or is likely to reach, the hands of the liquidator. The business of the bank at the *Mauritius* was carried on during the interval in question by the officers of the bank there, acting apparently under the authority conferred upon them by the directors. This authority was not revoked in point of fact. It was, however, contended on behalf of the applicants that it was revoked in law by the mere appointment of the provisional liquidator. I cannot accede to that argument. I think the authority was not revoked until notice of the appointment reached the island. [His Lordship referred to —— v. *Harrison* (1); the judgment of *Buller*, J., in *Salte* v. *Field* (2); *Trueman* v. *Loder* (3); *Story* on Agency (4); and *Smith's* Mercantile Law (5).] Unquestionably advice is required in order to terminate the authority of an agent where the revocation is by act of the principal. The cases of revocation by bankruptcy and death stand on a peculiar footing. Bankruptcy for instance, divests the property, but neither the presentation of the winding-up petition, nor the appointment of a liquidator, nor even the winding-up order itself, divests the company's property. Notice of the presentation of the petition and the appointment of the liquidator was conveyed to the *Mauritius* at the earliest moment possible, and I think it would be wrong by a fiction of law to impute notice to the persons on that island at a time when it was impossible for them to have had notice. Lord *Romilly*, in *Emmerson's Case* (6) appears to have stated that advertisement of the winding-up petition in the *London Gazette* ought to be treated as notice to the whole world. But he was not dealing with a case of a distant island, and Lord *Westbury*, when sitting as arbitrator in the European Arbitration, declined to treat the *London Gazette* advertisement as notice before it could possibly have reached the person sought to be affected (*National Bank Case* (7)). Although the decision of Lord *Westbury* as arbitrator is not binding on me I think that it was right

(1) 12 Mod. 346.
(2) 5 T. R. 211, 215.
(3) 11 Ad. & E. 589.
(4) Sect. 470.
(5) 9th Ed. pp. 121, 122.
(6) Law Rep. 2 Eq. 231, 233.
(7) Europ. Arb. L. T. 92.

in principle and ought to be followed. It is further said on behalf of the applicants that the contract under which the money was paid and the bills purchased was entered into on the faith of the bank being a going concern, and that they are entitled to have their money paid back as having been paid under a mistake. There was no misrepresentation on the part of the officers of the bank at the *Mauritius* and no suppression of any fact within their knowledge, or which could, in the circumstances, have been within their knowledge. The purchasers of the drafts got what they bargained for, viz., drafts of the bank, the payment of which depended on the solvency of the head office at the time of their presentation. It would be a question whether persons dealing with what they knew to be a branch bank whose head office was in a distant country with which there was no direct or immediate means of communication ought to be deemed to contemplate the possibility of stoppage at the head office and to run the risk of transactions entered into with the branch office during the interval which must necessarily elapse before the information could be received at the branch. Lord Justice *Turner's* decision in *Emmerson's Case* (1) on appeal turned upon special grounds applicable to the equitable doctrine of specific performance. If it is necessary to decide the question, it would seem that the principle of *caveat emptor* applies. But whatever answer ought to be given to this question the argument founded on it, if correct, would result only in a demand against the corporation, and consequently in a mere right of proof. It was urged that the applicants had a right of action—either against the bank or the officials by whom the business was in fact conducted, or against the official liquidator. The case of *Smout* v. *Ilbery* (2) is amongst others an authority to shew that officers who have acted in good faith would not be liable. No action would be allowed to be brought against the bank itself under the 87th section of the *Companies Act*, 1862, except on the terms of not issuing execution, and the result, therefore, would be the same as proving in the liquidation; and the Court would not, in the circumstances of the case, permit the liquidator, who is its own officer, to be sued. The rule upon which the Court exercises the discretion intrusted to it by the 153rd

(1) Law Rep. 1 Ch. 433. (2) 10 M. & W. 1.

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section of the Act is to affirm all transactions *bonâ fide* entered into without notice of the petition, and complete at the date of the winding-up order. There would be an obvious injustice to the creditors of the bank if this rule were applied to all such of the intermediate transactions in the *Mauritius* as were complete, such as payment out to the creditors and the like, and if, while these transactions were allowed to stand, transactions consisting of payments in were made void. It would be almost impossible to undo the numerous transactions which occurred or to recover the money paid out—in many cases undoubtedly across the counter. I think I am not compelled by the terms of the Act of Parliament, or by any reasoning fairly derived from its provisions, to arrive at such inconvenient and inconsistent results. It appears to me that the transactions in question on the summons are not invalidated by the Act of Parliament, that the bills given by the officers of the bank on behalf of the bank were binding on the bank, and that the applicants are not entitled to an order for refunding the consideration paid, but merely to a right of proof. The case being a representative one it is right that I should allow, as I do, the costs of all parties out of the estate. I may add that it does not become necessary in my opinion to decide the question suggested by Mr. *Latham* on s. 10 of the *Judicature Act*, 1875. [His Lordship added that as in these cases questions of mutual credits might arise between the bank and bill holder, or between the bank and the payer of the consideration for the bill, it was necessary to decide as a matter of principle who should prove, the bill-holder or the payer of the consideration. He held that the holder of the bill was the person entitled to prove.]

Solicitors: *Michael Abrahams, Son & Co.; Freshfields & Williams.*

F. G. A. W.

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Nov. 7.

In re ORIENTAL BANK CORPORATION. *Ex parte* THE CROWN.

Crown—Prerogative—Companies Act, 1862 (25 & 26 *Vict. c.* 89) [*Revised Ed. Statutes, vol. xiv., p.* 202]—*Judicature Act*, 1875, *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 30, 40, 150.

The provisions of the *Bankruptcy Act*, 1883, which take away the priority of the Crown over other creditors in the distribution of assets in bankruptcy, have not, by virtue of the assimilating provisions contained in the *Judicature Act*, 1875, s. 10, been incorporated into the *Companies Act*, 1862, so as to bar the prerogative right of the Crown to issue process and thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a company in course of liquidation under the *Companies Act*.

MOTION on behalf of the Treasury, and on behalf of the Premier and Treasurer of the Colony of *Victoria*, and the law officers for the Crown colonies of *Ceylon*, the *Mauritius*, and *Natal*, that the official liquidator of the *Oriental Bank Corporation* might be ordered to pay in full out of the assets of the corporation the several sums which, at the commencement of the winding-up of the corporation, were due to the Crown in respect of dealings between the Crown and the corporation in the several colonies.

Previously to the commencement of the winding-up the corporation had acted as bankers for the Crown at *Melbourne*, *Natal*, *Ceylon*, and in the *Mauritius*, and the amounts in respect of which payment was claimed by this motion represented balances of the banking accounts kept by the various departments of the Crown with the corporation; sums for the use of Her Majesty's naval and military forces lodged for safe custody with the corporation, and balances due to the *Royal Mint* in *London* in respect of coin shipped to the colonies.

The question turned entirely upon the right of the Crown to payment in full, in priority over other creditors in the winding-up, having regard to the provisions of the *Companies Act*, 1862, the *Judicature Act*, 1875, s. 10, and the *Bankruptcy Act*, 1883.

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Sir *H. James*, A.G. (*Stirling*, with him), on behalf of the Crown :—

We are entitled to payment in full in priority over other creditors of the bank, in the distribution of assets under the winding-up, by virtue of the prerogative of the Crown, which has not been taken away by the *Companies Act*, 1862, not being specially mentioned in it: *In re Henley & Co.* (1). That case decides that all rights of the Crown, whether to distrain upon the property of the company or to priority of payment in competition with other creditors, remain unaffected. It will be sought to distinguish this case by the contention that inasmuch as by sect. 150 of the *Bankruptcy Act*, 1883, which must be read in connection with sect. 10 of the *Judicature Act*, 1875, the priority of the Crown is taken away in bankruptcy administration, it is equally taken away, by virtue of sect. 10, in respect of winding-up proceedings under the *Companies Act*, 1862.

If this were an application in bankruptcy we might admit that the priority of the Crown was gone. But, looking at sect. 10, the assimilation of the law in winding up under the *Companies Act* and in bankruptcy, is limited to the three cases specified, viz. the respective rights of secured and unsecured creditors, debts and liabilities provable, and the valuation of annuities and future and contingent liabilities—which are to be reduced to the same level, but it in no way affects the priority of debts, or the rights, *inter se*, of secured and unsecured creditors: *In re Maggi* (2); and certainly does not abolish the priority of the Crown in winding-up proceedings. And even if, as regards the subject, the assimilation includes priorities, there is no assimilation as regards the rights of the Crown, for no prerogative or right of the Crown can be taken away unless there are express words or clear indications to that effect in the statute. In cases where the Crown is not mentioned in an Act of Parliament, the result is the same as if there had been an express reservation, excepting the Crown from the particular legislation.

[CHITTY, J. :—Suppose the *Bankruptcy Act* of 1883 had been in force at the time of the passing of the Act of 1875 ?]

(1) 9 Ch. D. 469. (2) 20 Ch. D. 545.

The case would be stronger against me, but still I should contend that the Crown was not bound. In the *Judicature Act*, 1875, s. 10, the Legislature has in effect said that this Act shall not apply to the Crown whatever takes place; and although the *Bankruptcy Act*, 1883, provides that in bankruptcy proceedings the Crown shall be bound, inasmuch as the original assimilating statute declared that the Crown should not be affected by the assimilation of administration in a winding-up to that under the bankrupt laws, it is perfectly immaterial whatever legislation afterwards takes with respect to the Crown in proceedings under the bankrupt laws.

Sir *F. Herschell*, S.G. (*Vaughan Hawkins* and *J. Dennistoun Wood*, with him), for the Crown colonies of *Ceylon* and the *Mauritius*, and the colony of *Victoria*:—

We also rely upon *In re Henley & Co.* (1), which establishes—1, the general prerogative of the Crown to be paid its debts in priority to the subject when they come in competition; and, 2, that the prerogative of the Crown to issue legal process against the company is unaffected by the *Companies Act*, 1862. Sect. 10 of the *Judicature Act*, 1875, does not effect a complete assimilation between the mode of administration in bankruptcy and under a winding-up, but only professes to do so in certain specified respects, so that the priority of the Crown is left untouched. But even assuming that the right of the Crown to be paid in priority is done away with by sect. 10, coupled with the *Bankruptcy Act*, 1883, how are the other prerogatives of the Crown affected? As the *Companies Act*, 1862, does not bind the Crown, it will not by reason of that Act be restrained from pursuing any of those remedies against a company which it could exercise before the Act. If so, what is there to take away the right of the Crown to sue and issue process against a company notwithstanding the existence of a winding-up order? It cannot be said that sect. 10 touches, or has anything to do with, such right; therefore, even if the contention on the other side be well founded as to priority, which we say it is not, there is no answer to our claim to the other prerogative which was equally asserted in *In re Henley & Co.*

(1) 9 Ch. D. 469.

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No distinction can be drawn between the rights of the Crown, as regards prerogative in this country and in the colonies, wherever Her Majesty's dominions extend: *In re Bateman's Trust* (1); and this applies where (as in *Victoria*) the colony possesses an independent legislature, except so far as the statute giving the colony that independent position may deprive the Crown of its independent prerogative.

Romer, Q.C., and *H. B. Buckley*, for the colony of *Natal*.

Macnaghten, Q.C., and *W. Latham*, for the liquidator:—

We are quite willing to concede that the prerogative of the Crown in the colonies is as high as in this country. Nor do we quarrel with the decision in *In re Henley & Co.* (2), for at that time there can be no doubt whatever that the Crown was not bound by the *Companies Act*, 1862, but what we rely upon is the legislation subsequent to that case, which has caused it to be no longer applicable. In the earlier cases a very narrow construction was placed upon sect. 10, as if its only object was to get rid of the rule in *Mason* v. *Bogg* (3) that a secured creditor could, both in Chancery in administration, and under the winding-up of a company, prove for the full amount of his debt without deducting the value of his security, and then realise his security, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realising or valuing his security: *In re Withernsea Brick Works* (4) (overruling *In re Printing and Numerical Registering Company* (5)). But a more extended construction has since been given to the section. In *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Co.* (6) *Jessel*, M.R., says (7): "I cannot read the enactment in this limited way, for it does not merely say 'as to the respective rights of secured and unsecured creditors,' but goes on to say, 'and as to debts and liabilities provable,' which must mean as to what debts and liabilities can be proved, and the manner in which they are to be proved." And in *S. C.* (8) Lord *Selborne* held

(1) Law Rep. 15 Eq. 355.
(2) 9 Ch. D. 469.
(3) 2 My. & Cr. 443.
(4) 16 Ch. D. 337.
(5) 8 Ch. D. 535.
(6) 9 Q. B. D. 648.
(7) Ibid. 662.
(8) 9 App. Cas. 434.

that not only the then existing rules under the law of bankruptcy were thereby made applicable in winding up, but also any future addition or alteration which in legislation as to bankruptcy might be thought fit. And in *In re Milan Tramways Company* (1) his Lordship stated (2) that sect. 10 must be treated as applicable to any company in liquidation until it was shewn that the assets were sufficient for payment of the debts in full. Then, by the *Bankruptcy Act*, 1883, debts of the Crown are included amongst debts provable in bankruptcy: sect. 37 (3). Debts of the Crown are not mentioned in sect. 40 as debts payable in priority to all other debts, and sect. 150 expressly provides that the provisions of the Act "relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown." The effect of sect. 10 being to incorporate in the winding-up of any company under the *Companies Acts* all the rules of bankruptcy as to debts provable, under which the previous rights of the Crown are certainly barred, can it be said that the assets are to be distributed here on a totally different footing, as if the Act of 1883 had not been passed? No such words as those suggested by the Attorney-General are to be found in the Act, and "necessary implication" cannot be extended so as to mean that the words "except the Crown" are to be inserted. The effect of the winding-up order, and the appointment of the official liquidator, is, by the *Companies Act*, 1862, s. 94, to constitute the official liquidator a trustee for the creditors: *In re General Rolling Stock Company* (3); and, by sect. 98, to impress a trust upon the assets of the company for their application in discharge of the liabilities of the company, so that the assets no longer remain in the debtor, and the independent right of the Crown against the property is prevented: *In re Bonham* (4).

CHITTY, J.:—

It is settled law that on the construction of the *Companies Act*, 1862, the Crown is not bound; the Crown not being named, and there being no necessary implication arising from the Act itself

(1) 25 Ch. D. 587.
(2) Ibid. 591.
(3) Law Rep. 7 Ch. 646.
(4) 10 Ch. D. 595.

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by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the Court of Appeal in the case of *In re Henley & Co.* (1). In that case there were two prerogatives brought into question—the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that that prerogative was not taken away. The other was the prerogative which the Crown, not being bound by the statute, had, notwithstanding the statute, to issue process. That was also held not to be taken away. The effect of that decision was—I am speaking now of the Act of 1862 as it stood, apart from the effect of the subsequent legislation—that the Court had no jurisdiction under the 87th section of the Act to restrain the Crown from proceeding by way of distress, or by the issuing of any other process which it was competent to the Crown to issue. The 98th section of the Act of 1862 contains an enactment that the Court shall cause the assets of the company to be collected and applied in discharge of its liabilities. Now, the fund to be administered would consist, by virtue of the decision in *In re Henley & Co.*, of the whole of the assets of the company, if the Crown came in under the liquidation, and sought to prove, and the Crown would then retain its right of priority as against the other creditors. But if the Crown stood out and insisted on its prerogative, then the assets to be administered would be the assets of the company, less that portion of the assets which the Crown had taken away. That was the state of the law when the 10th section of the *Judicature Act* of 1875 came into operation. The material words of that section for the present decision are that the same rules are to prevail and to be observed as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt. On behalf of the liquidator reference is made to the *Bankruptcy Act*, 1883, and the question is how much of the *Bankruptcy Act*, 1883, is imported by the 10th section of the *Judicature Act* of 1875 into the Act of 1862. On an examination of the *Bankruptcy Act* of 1883, particularly having regard to the 30th, 40th, and 150th sections of that Act, the result in regard to the prerogative of the Crown in bankruptcy appears to

(1) 9 Ch. D. 469.

be that the Crown debt was provable, and with certain exceptions, not necessary to be stated, the priority of the Crown was taken away, and the 150th section deals, not merely with the priorities of debts, but also with the remedies which the Crown has against the property of the debtor. It is not necessary to decide, but it may be that so much of the *Bankruptcy Act* of 1883 as relates to the Crown's priority is imported into winding-up proceedings by the 10th section of the *Judicature Act*, 1875. I say it may be; I do not consider it necessary to decide it. But it appears to me to be plain that that portion of the 150th section which takes away the remedies of the Crown against the property of the debtor is not brought into the *Winding-up Act* by reason of the 10th section. There are no words that will cover it, and I should be acting in contravention of the established principles of construction of Acts of Parliament with reference to the Crown's prerogative if I said that the prerogative of the Crown—the prerogative of the Crown to issue process notwithstanding the Act of 1862—was taken away by the words which relate to the debts provable, and relate to them only. I have heard an ingenious argument to shew that by tracing the thing out that ought to be the result, but in my opinion there is no such necessary implication as the law requires to enable me to say that that argument is correct. In fact, I think the argument fails. The result is that the Crown will be entitled to issue process. The liquidator, very properly, for the purpose of avoiding unnecessary expense, has agreed that the question now before the Court shall be tried on the same principles as if the Crown had put in exercise its prerogative. The result therefore is that the Crown is entitled to be paid in full. No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.

Solicitors: *Hare & Co.; Sutton & Ommanney; Palmer, Eland & Nettleship; Freshfields & Williams.*

F. G. A. W.

CHITTY, J.

1884

Nov. 21;
Dec. 5.

SMITH *v.* DAVIES.

[1883 S. 5642.]

Foreclosure Action—Rules of Supreme Court, 1883, *Order* XV., *rr.* 1, 2—*Accounts and Inquiries.*

In foreclosure actions where there is no preliminary question to be tried, the plaintiff may obtain, under Rules of Supreme Court, 1883, Order XV., an order for an account with all necessary inquiries, and the usual directions as in a common foreclosure judgment *nisi*. Such order should be applied for by summons in Chambers and not by motion in Court, and only the costs of a summons in Chambers attended by counsel will be allowed.

FORECLOSURE ACTION.

The Plaintiff in this case moved, under Rules of Supreme Court, 1883, Order XXXII., rule 6, that judgment might be given in accordance with the claim in his statement of claim, or that such further or other order might be made as he might be entitled to upon the admissions in the statement of defence or otherwise.

The Defendants by their statement of defence stated: "We do not admit" the several mortgage deeds in respect of which the Plaintiff claimed, but they did not otherwise traverse the allegations contained in the statement of claim.

F. T. Procter, in support of the motion:—

We have proved the mortgage deeds strictly, and as there is no specific traverse there is what amounts to a sufficient admission on the part of the Defendant to entitle the Plaintiff to move for judgment as upon an admission of fact in the pleadings: *Rutter* v. *Tregent* (1); *Barnard* v. *Wieland* (2).

W. Young Clare, for the Defendants:—

We state distinctly that we do not admit the mortgage deeds in respect of which the Plaintiff claims, and therefore the Court cannot make the order.

CHITTY, J., allowed the objection, and ordered the motion to stand over, with leave to amend the notice of motion, so as to

(1) 12 Ch. D. 758. (2) 30 W. R. 947.

make it an application for an account, with all necessary inquiries and directions, under Rules of Supreme Court, 1883, Order XV., rule 1.

The motion having been amended by adding a claim for an account of what was due to the Plaintiff for principal and interest under the mortgage in the pleadings mentioned, and for his costs of action, was now renewed.

F. T. Procter submitted that the Plaintiff was entitled under Order XV., rule 1, to the usual judgment for foreclosure *nisi*.

W. Young Clare, for the Defendants :—

A judgment for foreclosure is not within the scope of Order XV., rule 1, and in any case the application, as pointed out by Order XV., rule 2, should have been made by summons in Chambers.

CHITTY, J. :—

I have no doubt as to the construction to be put upon Order XV., rule 1, the alteration introduced by that order having, as I understand, been made to meet cases like the present. Under the corresponding Order XV. of the Rules of Court, 1875, the practice of the late Master of the Rolls was not to direct an account only when the action was simply a mortgagor's redemption action, unless the plaintiff assented to putting himself under the condition of being foreclosed if the result should be against him. The old rule having been amended by extending it to all cases where the indorsement on the writ involves taking accounts, it would appear that when the action is by the mortgagee for foreclosure, and where (as in this case) there is no preliminary question to be tried, the proper course is to make an order for the proper account with all necessary inquiries, and the usual directions as to foreclosure *nisi*, that is to say, the usual foreclosure judgment. Such an order is not a final order of foreclosure, but is equivalent to what was formerly called a decretal order that the mortgagor be foreclosed; of course he is not foreclosed absolutely until the final order is made. This seems to do justice where, in the terms of the rule, there is no preliminary question to be tried. In the present

CHITTY, J. 1884 SMITH v. DAVIES.

case there is, in my opinion, no such preliminary question, and the Plaintiff is entitled to such an order. But as under Order XV., rule 2, the application should have been made by summons in Chambers, the Plaintiff will not be allowed the additional costs incurred by moving in Court, but only such costs as he would have had if he had taken out an amended summons, and such summons had been attended by counsel in Chambers.

Solicitors: *H. P. Cobb; J. Pettengill.*

F. G. A. W.

CHITTY, J. 1885 Jan. 26, 27; Feb. 2.

In re BIRMINGHAM AND LICHFIELD JUNCTION RAILWAY COMPANY.

Railway Company—Parliamentary Deposit—Abortive Undertaking—Application of Deposit—Promoters and Parliamentary Agents.

Under the usual provision, in an Act incorporating a railway company, that in the event of the undertaking being abortive the parliamentary deposit shall either be forfeited to the Crown, or, in the discretion of the Court, be wholly or in part applied, as part of the assets of the company, for the benefit of the creditors thereof, the Court will not apply the deposit for the benefit of all the creditors without distinction as to the nature and merit of their claims; and accordingly the promoters and the parliamentary agents claiming in respect of costs incurred in obtaining the Act, or in relation to the promotion of the company, not being "meritorious creditors" (*In re Lowestoft, Yarmouth, and Southwold Tramways Company* (1)), will not be admitted to share in the distribution of the fund.

THIS was the further hearing of a petition by the Solicitor for the Treasury for a transfer of deposit moneys standing to the credit of "The undertaking of the *Birmingham and Lichfield Junction Railway Bill* (Session 1874)."

The *Birmingham and Lichfield Junction Railway Company* was incorporated by an Act of Parliament passed in 1872 (35 & 36 Vict. c. clxxii.), with power to make and maintain the railways therein mentioned; the powers of compulsory purchase being limited to three years from the passing of the Act, and a period of five years being limited for the completion of the railway.

By the *Birmingham and Lichfield Junction Railway (Deviation)*

(1) 6 Ch. D. 484.

Act, 1874, the company were empowered to make certain deviations from the railways authorized by the Act of 1872, and to abandon a portion of such railways.

By sect. 26 the powers of compulsory purchase were not to be exercised after the expiration of three years from the passing of the Act. By sect. 27, after reciting that pursuant to the standing orders the sum of £1780 had been deposited in Court in respect of the application for the Act, it was enacted that this sum should not be paid or transferred to or on the application of the persons named in the warrant or order issued in pursuance of the Act, unless the company should previously to the expiration of the time limited by the Act for completion of the railways, either open the railways, or prove to the satisfaction of the Board of Trade that the company had paid up one-half of the amount of the capital authorized to be raised by means of shares, and had expended for the purposes of the Act a sum equal in amount to such one-half of the capital, and if the period should expire before the company should either have opened the railway, or given proof to the effect before mentioned, the money deposited should be applied as provided by sect. 28.

Sect. 28, after directing that the deposit should be applicable, and after due notice in the *London Gazette* should be applied, towards compensating any landowners or other persons whose properties might have been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railways . . . . and should be distributed in satisfaction of such compensation as the Court of Chancery should direct, provided :—"and if no such compensation shall be payable, or if a portion of the said sum of money shall have been found sufficient to satisfy all just claims in respect of such compensation, then the said sum, or such portion thereof as may not be required as aforesaid, shall either be forfeited to Her Majesty, and accordingly be paid or transferred to or for the account of Her Majesty's Exchequer in such manner as the Court of Chancery thinks fit to order ; or, in the discretion of the Court, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator of the company, or be otherwise

CHITTY, J. 1885 *In re* BIRMINGHAM AND LICHFIELD JUNCTION RAILWAY CO.

applied as part of the assets of the company for the benefit of the creditors thereof."

This Act contained a clause (sect. 41), which was identical with sect. 61 of the Act of 1872, that all costs, charges, and expenses of and incidental to the preparing for, obtaining and passing of the Act, or otherwise in relation thereto should be paid by the company.

By the *Birmingham and Lichfield Junction Railway Act*, 1877, the time for completion of the railway was extended to three years from the 6th of August, 1877. An application for a further extension of the time for the construction of the railway was refused in 1878, and on the 6th of August, 1880, when the time limited by the Act of 1877 expired, the railway had been neither completed nor even commenced. The company had not given any notice to treat, and had not purchased any lands under the powers conferred by the Acts of 1872 and 1874, and no part of the deposit in Court, now represented by £1942 14*s.* 0*d.*, was required to be applied in compensating any landowners or other persons injuriously affected, under sect. 28 of the Act of 1874.

In May, 1873, *Thomas Hewitt* commenced an action against the company to recover the sum of £1200 which had been agreed to be paid him in consideration for his withdrawing all opposition to the passing of the Act of 1872, and in July of the same year signed judgment against the company for £1274 1*s.* 2*d.*

On the 3rd of December, 1880, an order was made charging the £1982 14*s.* 0*d.* with the amount of *Hewitt's* judgment and costs, and a stop order on the fund was subsequently obtained by him.

In December, 1880, *Hewitt* applied to the Board of Trade for a warrant of abandonment of the railways authorized by the Acts of 1872 and 1874, but the Board refused to grant the warrant, and consequently no order for winding up the company had been made.

A petition by *Hewitt* for the appointment of a receiver of the undertaking of the company, for an inquiry what compensation (if any) was due to any landowners, and payment of the fund into Court to the receiver to be applied, after satisfaction of compensation claims, in payment of the amount due to *Hewitt* and to

the other creditors of the company, was on the 28th of May, 1881, dismissed by the late Master of the Rolls without costs (1).

In these circumstances the Solicitor for the Treasury petitioned for a transfer of the £1942 14*s.* 0*d.* in Court, as now liable to be forfeited to Her Majesty, but did not desire to offer any opposition to the exercise by the Court of its discretion in favour of *bonâ fide* and meritorious creditors of the company, as if the company had been ordered to be wound up, or a receiver had been appointed.

Upon the original hearing of the petition on the 14th of January, 1882, inquiries were directed:

1. Whether there were any and what assets of the company or other funds which if the company were being wound up would be applicable for payment of its debts.

2. What debts and claims there were which if the company were being wound up would be provable in the liquidation, and ought to be paid out of the deposit-money.

In answer to these inquiries the chief clerk had found, (1) that the Earl of *Lichfield*, Sir *J. W. C. Hartopp*, and another, three of the original subscribers and promoters and directors of the company, claimed payment of £2646 2*s.* 8*d.* which had been paid by them to their solicitors in respect of costs incurred in obtaining the Act of 1872 and subsequent Acts, in defending litigation, and in payments of interest and commission to bankers who had advanced the deposit money.

(2.) That *William Bell*, who had been employed as parliamentary agent, claimed £365 0*s.* 1*d.* as the balance of his costs of obtaining the Acts, and of opposing competing schemes.

(3.) *Hewitt's* claim for his judgment debt, costs, and interest (£1098 8*s.* 8*d.*)

(4.) A claim by the secretary for salary, money paid, &c. (£181 19*s.* 7*d.*)

Stirling, in support of the petition:—

We do not oppose the exercise by the Court of its discretion under sect. 28 to apply the deposit in favour of *bonâ fide* and meritorious creditors of the company, but neither the promoters nor the parliamentary agent can receive any part of it. Sect. 28

(1) 18 Ch. D. 155.

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is identical in substance with the Board of Trade Regulations, r. 28, on which it has been decided that the promoters are not by any subterfuge or device to get the deposit money back again, either directly or indirectly, if the work is not done; that the creditors only are to be considered and not the shareholders, and that the only creditors who are to be considered are meritorious creditors, that is, persons who are not guilty or responsible for what has happened in any shape or way: *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (1); *In re Bradford Tramways Company* (2). The claim of Mr. *Bell* is for his costs incurred on account of the promotion of the company, and as such cannot be paid out of the deposit: *In re Barry Railway Company* (3).

Whitehorne, Q.C., for the promoters and directors of the company whose claim was mentioned in the Chief Clerk's certificate:—

We are meritorious *bonâ fide* creditors of the company, and entitled to recover out of the deposit all moneys expended in obtaining the Act of 1872, as sect. 61 of that Act (which is repeated in the Act of 1874) provides that all costs, charges, and expenses of and incidental to the preparing for, obtaining and passing of the Act or otherwise in relation thereto shall be paid by the company. We also claim the expenses incurred in obtaining the *Extension* and *Deviation Acts* after the incorporation of the company, and the costs of litigation, which have been paid by us to the solicitors of the company. In *In re Lowestoft, Yarmouth, and Southwold Tramways Company* the company was a mere bogus company, and all that was decided was that promoters were not to get back the money paid by them for the parliamentary deposit. The Master of the Rolls could not have meant to decide that a director or promoter could not recover debts incurred in respect of payments properly made on behalf of the company.

B. B. Rogers, for *Bell*, the parliamentary agent:—

Assuming that promoters are not entitled to be paid out of the deposit, yet a parliamentary agent is not a promoter and is

(1) 6 Ch. D. 484, 489.
(2) 4 Ch. D. 18; overruling S.C. 2 Ch. D. 373.
(3) 4 Ch. D. 315.

entitled to be so paid for the work he has done: *In re Kensington Station Act* (1); unless indeed he has stepped beyond his duties as parliamentary agent, and become himself an active promoter, as was the case in *In re Brampton and Longtown Railway Company* (2) and *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (3). A parliamentary agent as such is quite outside the definition of a promoter as given in *Twycross* v. *Grant* (4). But it is submitted that even if he is to be regarded as a promoter he is now entitled to be paid out of the deposit. There has been a complete change in the policy of the Legislature with regard to parliamentary deposits. So long as what remained of the deposit after paying creditors was returned to the promoters who paid it in, words were always inserted (as in the *Abandonment of Railways Act*, 1869, sect. 5) authorizing the Court to disallow debts incurred on account of the promotion of the company. The reason is given by *James*, L.J., in *In re Barry Railway Company* (5). It was considered unfair that the depositors should be called on to pay debts due "to people who were substantially in the same boat as themselves." But now that the deposit goes to the Crown, that reason has ceased to exist, and accordingly the words drawing a distinction between promotion creditors and other creditors are now always omitted. The only discretion now given to the Court is to decide whether the deposit shall or shall not go to the Crown. No discretion is given it to make any distinction between one class of creditors and another. The remarks of the late Master of Rolls in *In re Lowestoft, Yarmouth, and Southwold Tramways Company* as to meritorious creditors proceeded on a misapprehension of the language of *Bramwell*, L.J., in *In re Bradford Tramways Company* (6). There is no such thing as a meritorious creditor. All creditors are entitled to share alike in such part of the deposit as does not go to the Crown.

[CHITTY, J.:—Have you, under the clause directing all costs, charges and expenses of obtaining the Act to be paid by the company, a right to sue the company?]

(1) Law Rep. 20 Eq. 197.
(2) Ibid. 10 Eq. 613.
(3) 6 Ch. D. 484.
(4) 2 C. P. D. 469, 541.
(5) 4 Ch. D. 315, 322.
(6) 4 Ch. D. 21.

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Yes: *Hitchins* v. *Kilkenny Railway Company* (1); *In re Kensington Station Act* (2).

Stirling, in reply:—

The Act of 1874 distinctly states (sect. 27) that unless the company do certain things, which have not been done in this case, the deposit money shall not be paid out to the persons who paid it in.

The Court will exercise discretion as to the application of the fund, but so as not to defeat the beneficial legislation which was intended to discourage mere paper companies got up by solicitors and parliamentary agents, which never come into real existence, and have never done any active work. We do not object to the application of the fund in payment of meritorious creditors, who have supplied goods—for instance, rails—to the company, but no part ought to be paid out to promoters, parliamentary agents, or engineers, who are responsible for having brought out an abortive scheme. To do so would be holding out a premium to persons engaged in or about the promotion of a company to let the undertaking drop, as they will thus get payment out of the parliamentary deposit. So far from the special Act being more favourable to these claims the restriction is tighter, and persons are now excluded who would not have been excluded under the former legislation.

CHITTY, J.:—

The effect of the concession which has been made by the Crown on the petition, as explained at the Bar, is that I am called upon to exercise the discretion vested in the Court under sect. 28 of the special Act of 1874, and to say whether the deposit is to remain forfeited to the Crown, or to be wholly or in part applied for the benefit of the creditors of the company.

The discretion is a judicial discretion, and is to be exercised not capriciously, but on intelligible grounds, regard being had to the course of legislation and the judicial decisions bearing on the subject. The course of legislation may be summarised shortly

(1) 9 C. B. 536. (2) Law Rep. 20 Eq. 197.

thus: Under the *Parliamentary Deposit Act* of 1846 the deposit went back to those who paid it in. Under the *Abandonment of Railways Act*, 1869, it was not to be paid back to the promoters. The section in the special Act of 1874 is not an isolated enactment, but it is part of a general system of legislation in regard to the deposit. Similar provisions have of late years usually been inserted in the special Acts authorizing the construction of railways, and are found in the rules of the Board of Trade relating to tramways. The deposit never was the money of the company, and on the reading of the section it is plain that when the claims of landowners have been satisfied the money is not to be applied for the benefit of all the creditors of the company without distinction as to the nature and merits of their claims.

The leading authorities on the subject are the decisions of the Court of Appeal in *In re Bradford Tramways Company* (1), and of the late Master of the Rolls in *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (2). The effect of these decisions is that a distinction is drawn between the claims against the company which are, and those which are not, meritorious; and that the claims of the promoters of the company and persons engaged in the promotion or getting up of the company are not to be considered in the exercise of the discretion reposed in the Court as meritorious, notwithstanding they would rank as debts of the company in a winding-up. It appears to me that on the facts stated in the certificate, and consistently with these authorities, no part of the deposit ought to be applied in payment of the claims of the three directors who were promoters, or of Mr. *Bell*, the parliamentary agent. The company never had any real existence. [His Lordship after stating the effect of the findings, proceeded:—]

The claims of the directors, who were also promoters, relate to payments which they have made for obtaining the company's special Acts, or in relation to the promotion or matters connected with the promotion of the company, and the litigation referred to in the certificate, and they ought to be excluded.

As to Mr. *Bell's* claim as parliamentary agent, it is true that he was not a promoter in the stricter sense of the term; and no doubt, on the facts, it would appear that he expected to be paid

(1) 4 Ch. D. 18. (2) 6 Ch. D. 484.

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by the company, and is a creditor of the company. But the services he rendered as parliamentary agent were merely services rendered in bringing the company into existence as a paper company. The decision of the late Master of the Rolls in *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (1) is an express decision against his claim. It was argued by Mr. *Rogers* that that decision turned on the fact that the parliamentary agent there was also a promoter, but the Master of the Rolls did not refer to that circumstance in his judgment, and the fact mentioned in the report that a member of his firm was one of the promoters would not have been sufficient of itself to make him a promoter. The object of the legislation relating to the deposit is to place a check upon those who bring before Parliament undertakings which prove abortive. To apply the deposit in payment of the claim of the parliamentary agent would be inconsistent with the policy of the enactments and operate as a direct encouragement to those who take part in bringing unsubstantial and abortive schemes before the Legislature. The claim of the Crown, whether it ought to be regarded (in the language of Lord *Bramwell*) as a fine, or (according to the language of the late Master of the Rolls) as a compensation to the public for the injury done to the public by the failure to make the railway, and by the occupation of the ground during several years by an abortive scheme, is preferable to the claim of the parliamentary agent. The decision of Vice-Chancellor *Malins* in *In re Kensington Station Act* (2) in which he allowed the parliamentary agent's claim, turned upon sect. 5 of the *Abandonment of Railways Act*, 1869, and the question whether he was a promoter. That has little or no bearing on such a section as that which is now before me, and does not in my opinion affect the discretion which I have to exercise.

The order was that after paying the costs of the Petitioners, the fund was to be divided between the two creditors, *Hewitt* and the secretary, and the surplus (if any) to go to the Crown.

Solicitors: *Hare & Co.*; *Godden, Holme & Co.*; *Miller, Smith, & Bell.*

(1) 6 Ch. D. 484. (2) Law Rep. 20 Eq. 197.

F. G. A. W.

In re MOODY AND YATES' CONTRACT.

CHITTY, J.

1885
Feb. 6.

Vendor and Purchaser—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 4, 6—*Peppercorn Rent—Evidence of Title.*

The *Conveyancing and Law of Property Act*, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent so as by production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of shewing that the covenants with their lessor (to finish the house within —— months to the satisfaction of the lessor's surveyor) have been duly performed and observed.

The certificate of the lessor's surveyor that the house has been finished to his satisfaction is not a certificate or "evidence" within sect. 3, sub-s. 6, the expense of obtaining which must be borne by the purchaser, but a part of the title itself.

ADJOURNED SUMMONS on behalf of the vendors, claiming a declaration that the objections and requisitions of the purchaser in respect of the title comprised in the contract of sale had been sufficiently answered by the vendors and a good title shewn in accordance with the contract.

On the 16th of April, 1884, *W. T. Yates* agreed to buy from Messrs. *Moody & Highett*, who were builders, a leasehold house for £500, and paid a deposit of £50, the receipt which was given to him for this sum stating that the house was "to be completed for occupation, fitted with Venetian blinds, and the garden laid out, &c., as arranged; ground rent to commence in September, 1884, occupation in June."

The house had been demised to *Moody & Highett* for a term of ninety years from the 25th of December, 1881, at the yearly rent, until the 29th of September, 1884, of a peppercorn, and during the residue of the term at the yearly rent of £7 payable quarterly; the first quarterly payment on the 25th of December, 1884. And the lease contained a covenant by the lessees to finish fit for habitation within six calendar months from the date thereof at their own cost the house with proper boundary walls or fences and drains to the satisfaction of the surveyor for the time being of the lessors, and with all necessary fixtures and fastenings to the same.

CHITTY, J.
1885
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In his requisitions on the title the purchaser required the certificate of the lessor's surveyor that the premises had been completed to his satisfaction in accordance with the covenant in the lease, to be produced and handed over on completion.

The vendors, in reply, relied on the *Conveyancing Act*, 1881, sect. 3, sub-sect. 4, but would obtain the certificate at the purchaser's expense.

The purchaser rejoined that the ground rent did not commence until the 29th of September, 1884, and that sect. 3, sub-sect. 4, did not apply.

The vendors thereupon offered to obtain a receipt for a peppercorn, "and this would bring the matter within the Act." They had no certificate in their possession, but it could be obtained by them at the purchaser's expense.

The purchaser insisted on the certificate of the lessor's surveyor being handed over to him free of expense.

The vendors thereupon referred to sect. 3, sub-sect. 6.

The purchaser answered that this section did not apply.

The vendors having taken out a summons in July last in Chambers, under the *Vendor and Purchaser Act*, 1874, for the purpose of obtaining a declaration that a good title had been shewn, the Chief Clerk had decided in favour of the purchaser, and the Judge in Chambers had taken the same view.

The summons was now adjourned into Court.

Spence, for the vendors:—

We have offered to produce a receipt for the peppercorn reserved as rent until the 29th of September, 1884, and that according to the *Conveyancing Act*, 1881, sect. 3, sub-s. 4, is sufficient evidence that all the covenants and provisions of the lease granted to the vendors have been duly performed and observed up to the date of actual completion of the purchase. If the vendor requires the actual certificate of the surveyor, which is an evidence of title not in our possession, he must bear the expenses of procuring and producing it, though it forms part of our title: sect. 3, sub-sect. 6; *In re Johnson & Tustin* (1).

(1) 28 Ch. D. 84.

Chadwyck Healey, for the purchaser :—

Sect. 3, sub-sect. 4, though it covers breaches of covenant after the contract and up to completion in all cases where a rent is reserved, does not provide for the exceptional case of a lease at a nominal rent containing covenants: *Wolstenholme* and *Turner's* Conveyancing Acts (1); and is clearly inapplicable in this case, where a peppercorn, which is rendered and is not the subject of "payment," has been reserved.

With respect to the surveyor's certificate the title is bad without it, as if it is not given the lessor has the right to forfeit the lease; and sect. 3, sub-sect. 6, cannot mean that a purchaser is to be compelled to pay the expenses of establishing the vendor's title.

Spence, in reply :—

Rent includes render, and "payment" used in sect. 3, sub-sect. 4, would be properly applied to a peppercorn. This is shewn by sect. 65, which uses the words, "a peppercorn rent, or other rent having no money value."

CHITTY, J. :—

The contract is an open contract, and sect. 3 of the *Conveyancing Act*, 1881, applies. The first point is whether the purchaser is under sect. 3, sub-sect. 4, bound to assume that all the covenants in the lease have been duly performed upon production to him by the vendors of the receipt for the peppercorn rent reserved by the lease, the vendors contending that this receipt is a receipt within sect. 3, sub-sect. 4, "on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase." In my opinion sect. 3, sub-sect. 4, does not apply to a peppercorn rent, which in strictness is rendered and not paid. This is confirmed by the language of sect. 65, where "a peppercorn rent or other rent having no money value" is contrasted with a rent which has been released, become barred by lapse of time, "or has in any other way ceased to be payable."

The other point which has been raised is upon the covenant in

(1) 3rd Ed. p. 21.

CHITTY, J. 1885 *In re* MOODY & YATES' CONTRACT.

the lease by the lessees (the vendors) that they will within six months from the date of the lease complete and finish fit for habitation certain buildings to the satisfaction of the surveyor of the lessor. The purchaser has asked the vendors to produce the surveyor's certificate that the buildings have been completed to his satisfaction. The vendors reply that they will do so at the purchaser's expense, and it is contended that the certificate comes within the meaning of the word "evidences not in the vendor's possession" in sect. 3, sub-sect. 6, the expense of producing which must be borne by the purchaser. But, in my opinion, that subsection does not apply, and the purchaser is entitled to ask for evidence that the covenant has been performed, as if not performed the vendors have no title. Producing the certificate of the surveyor, which is not in existence, is not obtaining evidence of the title but is part of the title itself. I think, therefore, that the vendors are wrong, and their application must be dismissed, with costs.

Solicitors: *Elborough & Dean*, for *S. G. Edridge, Croydon; Pedley & Bartlett.*

F. G. A. W.

CHITTY, J. 1885 *Jan.* 31; *Feb.* 10.

DOBLE *v.* MANLEY.

[1884 D. 2010.]

Mortgagor and Mortgagee—Foreclosure Action—Subsequent Incumbrances—One Period for Redemption.

In a foreclosure judgment against the mortgagor and subsequent incumbrancers, only one period for redemption will be fixed where none of the defendants appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled," or only that they "claim to be entitled" to charges upon the mortgaged premises.

THIS was a foreclosure action by first mortgagees against the mortgagor and subsequent incumbrancers, who by the statement of claim were stated to be "entitled to" their several incumbrances. None of the Defendants delivered any statement of

defence, and the Plaintiffs moved for judgment according to the statement of claim.

The Defendants did not appear on the motion.

J. M. Solomon, for the Plaintiffs, asked that one time only should be fixed for redemption. The practice had not been altogether uniform, and in a recent case Mr. Justice *Kay*, in allowing successive periods for redemption, appeared to have taken a distinction between an allegation in the pleadings that the subsequent incumbrancers "were," or that they "claimed to be," entitled to their incumbrances.

Feb. 10. CHITTY, J., said that he had consulted with Mr. Justice *Kay* and Mr. Justice *Pearson*, and that they were all unanimously of opinion that where the defendants did not appear, one time only should be fixed for redemption, whether the statement of claim alleged that they were "entitled," or only that they "claimed to be entitled" to incumbrances. To fix several successive periods was to make a decree as between co-defendants, which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them (1).

Solicitors: *Hubbard, Son, & Eve.*

(1) In accordance with this decision the order in the case before Mr. Justice *Kay*, fixing successive times for redemption, was withdrawn, and one period only fixed.

F. G. A. W.

CHITTY, J.
1884
Nov. 21;
1885
Feb. 20.

In re MITCHELL & CO.'S TRADE-MARK.
In re HOUGHTON & HALLMARK'S TRADE-MARK.

Trade-marks—Patents, Designs and Trade-marks Act, 1883 (46 & 47 *Vict.* c. 57)—*Restricted User—Entry of Undertaking on Register.*

The entry, on the register of two similar trade-marks in the same class, of a note that the use of the marks registered is restricted by an agreement between the respective owners (the effect of which is not stated) is irregular, and contrary to the provisions of the *Patents, Designs and Trade-marks Act*, 1883; but, following *In re Rabone & Co.* (1), a note of the mutual undertakings not to use the marks except in a certain manner and within specified districts may be entered on the register.

MESSRS. *Mitchell & Co.*, of *Belfast*, and *Houghton & Hallmark* of *Liverpool*, having each applied to the Registrar of Trade-marks to register in Class 43 a trade-mark for whisky containing the words "*Cruiskeen Lawn*," in order to obviate the opposition which was threatened on both sides, and to avoid litigation, entered into an agreement dated the 22nd of April, 1884, by which it was agreed that they should both be at liberty to register their respective trade-marks, and that *Houghton & Hallmark* would not use the words "*Cruiskeen Lawn*" except in combination with the device in their mark, and in combination with the name of their firm, nor offer for sale whisky under the title of "*Cruiskeen Lawn*," or use these words in connection with whisky except in certain specified districts. *Mitchell & Co.* also thereby agreed not to use the words "*Cruiskeen Lawn*" except in combination with the name of their company, nor to advertise their whisky under this title so as to prejudice the goods of *Houghton & Hallmark*, and not to sell whisky under the title "*Cruiskeen Lawn*" in the specified districts. On registration of the marks a note of these restrictions was to be entered upon the Trade-marks Register with liberty, in default, for either party to apply to rectify the register by the insertion of such note.

Application was made to the Comptroller-General to consent (as in *In re Keep's Trade-mark* (2)) to an application to the Court that the registration should be with a note in each case of the

(1) Seb. Dig. 395. (2) 26 Ch. D. 187.

agreement, but the Comptroller declined to give such consent, and by order of the Board of Trade proceeded with the registration, and *Mitchell & Co.'s* mark was entered on the register on the 23rd of September, and *Houghton & Hallmark's* on the 4th of December, 1884.

On the 21st of November, *John Cutler* on behalf of *Mitchell & Co.* and *Houghton & Hallmark*, moved under sect. 90 of the *Patents, Designs, and Trade-marks Act*, 1883, that the register might be rectified as regarded the above-mentioned marks by adding thereto a note that the use of the marks was restricted by an agreement dated the 22nd of April, 1884; and in support of the application he referred to *In re Rabone & Co.* (1); *In re Leonardt* (2); *In re Kuhn & Co.'s Trade-marks* (3).

CHITTY, J., made the order, and directed due notice of such rectification to be given to the Comptroller.

1885. Feb. 20. Sir *F. Herschell*, S.G., and *Stirling*, now moved on behalf of the Comptroller-General to discharge the order of the 21st of November, 1884, as being irregular and contrary to the provisions of the *Patents, Designs, and Trade-marks Act*, 1883.

A trade-mark is granted for the whole of the *United Kingdom*, and the object of the note, which refers to the agreement between the parties, is to limit the use of the marks to particular districts, which is equivalent to creating a trust in favour of the rival trader for the rest of the kingdom, in violation of sect. 85 of the Act of 1883, which provides that no notice "of any trust expressed, implied, or constructive," is to be entered in the register. Moreover, the note on the register does not, as in *In re Rabone & Co.*, state the terms of the agreement by which the user is restricted, but merely refers to an agreement without giving any notice of what is its purport or effect, so that innocent parties without notice of the restrictions will be exposed to ligitation.

CHITTY, J., referred to *In re Whiteley's Trade-mark* (4), where the late Master of the Rolls granted registration upon an undertaking by the applicant, to be noted in the register, limiting his user of the mark.]

(1) Seb. Dig. 395.
(2) Ibid. 373.
(3) 53 L. J. (Ch.) 238, n.
(4) 43 L. T. (N.S.) 627, n.

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In re MITCHELL & Co.'s TRADE-MARK.

In re HOUGHTON & HALLMARK'S TRADE-MARK.

Romer, Q.C., and *John Cutler*, for the Respondents:—

There is nothing in the nature of a trust within the meaning of sect. 85 in the note which has been entered in the register. Registration may be granted in such a form as to be partial, by entering a note limiting the manner of user or the locality in which the mark is to be used: *In re Keep's Trade-mark* (1); *In re Farina* (2); *In re Rabone & Co.* (3). And as it must have been known to the framers of the Act of 1883, that rule 22 of the *Trade-marks Rules*, 1875, had been construed so as not to prevent the entry on the register of undertakings restricting the user, the re-enactment of rule 22 without alteration in sect. 85 shews that the former practice has been preserved. As to innocent purchasers, they will not be affected by the agreement, which is merely intended to restrict and regulate the user by the owners and assignees of the marks.

Sir *F. Herschell*, S.G.:—

If the owners of the marks had only asked for the entry of a note similar to that in *In re Rabone & Co.* we should not have raised this objection.

Romer, Q.C., consented to the addition of a note in that form.

CHITTY, J.:—

The order of the 21st of November, 1884, is erroneous, and the Comptroller-General, having had notice of it, has very properly taken the objection that it is contrary to the policy and principle of the Act, viz., that the register is to be kept clear, and shall give notice to all the world of everything which is material, but shall not contain any notice of any trust expressed, implied, or constructive.

The Comptroller is not bound to receive a copy of an agreement between the parties; and to place on the register a note for the purpose of shewing that the user of the mark is subject to an agreement merely referred to and not stated, and which could only be found by search, would be a violent departure from the

(1) 26 Ch. D. 187. (2) Seb. Dig. 405.
(3) Seb. Dig. 395.

principle of the Act. In *In re Rabone & Co.* (1) the late Master of the Rolls certainly did allow an undertaking by the parties restricting the user of the trade-mark to be entered on the register; and whether that case was rightly or wrongly decided, I should have great hesitation in overruling it, especially as it has been followed in several cases. The order will be varied by directing undertakings restricting the use of the mark to certain specified districts, as in *In re Rabone & Co.*, to be entered on the register. The Respondents must pay the costs of the application.

Solicitors: *Solicitors for the Board of Trade; Hutchinson & Mc Kenna.*

F. G. A. W.

BACKHOUSE *v.* ALCOCK.

[1881 B. 4121.]

Practice—Affidavit—Cross-examination—Production of Deponent—Expenses—Rules of Supreme Court, 1883, *Order* XXXVII., *r.* 21; *Order* XXXVIII., *r.* 28—15 & 16 *Vict. c.* 86, *ss.* 38, 41 [*Revised Ed. Statutes, vol. xi., pp.* 522, 523.]

The direction in Order XXXVIII., rule 28, of Rules of the Supreme Court, 1883, that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Order XXXVII., rule 21, of the same rules, which provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial, is not confined to the cross-examination of the deponent before the Court at the trial of the action, but applies also to a cross examination before the Chief Clerk in Chambers or before an Examiner.

ADJOURNED SUMMONS.

By the judgment in this action dated the 7th of June, 1883, it was among other things ordered that an inquiry should be made as to certain bills of costs that the Defendant alleged he had against certain persons named *Robson* and *Crick*.

In answer to such inquiry the Defendant brought in his bills of costs verified by affidavit.

(1) Seb. Dig. 395.

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On the 4th of March, 1884, on the application of the Plaintiffs, an order was made for the cross-examination of the Defendant before one of the Examiners of the Court upon his affidavit, and subsequently, on an appointment having been obtained from the Examiner, it was by consent arranged that *Robson*, who had filed an affidavit on behalf of the Plaintiffs, and *Crick*, who had filed an affidavit on behalf of the Defendant, should be cross-examined before the Examiner on the appointment for the cross-examination of the Defendant.

Robson attended the appointment before the Examiner, but the Defendant did not attend on the ground, as his solicitor stated, that no conduct money had been paid to him, nor did *Crick* attend.

On the 6th of December, 1884, a summons was taken out on behalf of the Plaintiffs that the Defendant and *Crick*, having failed to attend before the Examiner, the pending inquiry as to what bills of costs the Defendant had against *Robson* and *Crick* respectively might be proceeded with and answered without using or having regard to the affidavits of the Defendant and *Crick* (being the affidavits on which they failed to attend to be cross-examined), and without permitting any further evidence to be adduced by or on behalf of the Defendant.

Upon the summons being heard before the Chief Clerk, he was of opinion, on the authority of the case of *In re Knight* (1), that the party requiring the production of the witnesses was bound in the first instance to pay the expenses of such production.

The summons was accordingly adjourned to the Judge and then into Court, and now came on to be argued on the point raised by the Chief Clerk.

Sir *Arthur T. Watson*, in support of the summons:—

The practice prior to the *Judicature Act* appears from sects. 38 and 41 of the Act of 1852 (15 & 16 Vict. c. 86) and the General Order of the 5th of February, 1861, rule 19.

The case of *In re Knight* shews what the practice was under the Rules of Court, 1875, Order XXXVIII., rule 4. The practice

(1) 25 Ch. D. 297.

under the Rules now in force is governed by Order XXXVII., rule 21 and Order XXXVIII., rule 28. Rule 21 of Order XXXVII. is nearly in the same words as sect. 41 of the Act of 1852, which is an enactment that the same practice shall prevail as to evidence after decree as applies to evidence at the hearing, and effect must be given to it accordingly. Reading that rule in conjunction with rule 28 of Order XXXVIII., I submit that we are not bound to pay the expenses of the production of the witnesses.

Renshaw, for the Defendant:—

The provision in Rules of Court, 1875, Order XXXVIII., rule 4, altered the previous practice as to the expenses of a witness called to be cross-examined before the Court at the trial. Rule 28 of Order XXXVIII. of the Rules of Supreme Court, 1883, is in precisely the same terms as rule 4 of Order XXXVIII. of the Rules of 1875, and does not, as I submit, apply to a cross-examination before the Chief Clerk in Chambers or before an Examiner. It is, I submit, a *casus omissus*, and under these circumstances Order LXXII., rule 2, which provides that where no other provision is made by the Acts or Rules the present procedure and practice remain in force, applies, and accordingly the practice as laid down in *In re Knight* (1) governs this case, and the expenses of producing the witnesses must be borne in the first instance by the parties desiring the cross-examination.

CHITTY, J.:—

The question turns on rule 21 of Order XXXVII. of the Rules of Court, 1883, which provides that "evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to the trial." The evidence in this case has been taken by affidavit, and the Plaintiff now seeks to cross-examine the Defendant and *Crick* on their affidavits, and the question arises who, in the first instance, is to pay the expenses, whether the party who requires the production of the witnesses, or the party producing them for cross-examination.

The history of rule 21, which I have stated, is this: It is taken

(1) 25 Ch. D. 297.

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from the 41st section of the Act of 1852 (15 & 16 Vict. c. 86). That Act is now repealed, at all events, I am satisfied, for all purposes connected with the point I have to decide.

The words "hereinbefore provided," in the 41st section of that Act included many previous sections, but sect. 38 is the only one material to my decision. That section dealt with the evidence at what was then termed the hearing and now the trial, and so far as is material is as follows: "Provided always that any witness who has made an affidavit . . . . shall be subject to oral cross-examination . . . . by or before an Examiner . . . . and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the Court shall think fit otherwise to direct."

In other words that section threw the expenses in the first instance on the party desiring to cross-examine.

The 4th rule of Order XXXVIII. of the Rules of 1875, which were in force until the 24th of October, 1883, repeals that practice. Rules 25 to 30 of Order XXXVIII. of the Rules of 1883 contain the existing provisions with regard to the giving and taking of evidence at the trial. The material rule is the 28th, which provides that the party producing the deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. In other words that rule reversed the practice as it stood under sect. 38 of the Act of 1852.

This question was before the Court of Appeal in the case of *In re Knight* (1), but there it arose under Order XXXVIII., rule 4, of the Rules of Court, 1875, and it was held that there was a difference in the practice between taking evidence before and after the trial, but the question I now have to decide was left open.

Mr. *Renshaw* said that rule 21 of Order XXXVII. must be read strictly, and that it had no reference to the taking of evidence by affidavit after judgment. I think that reading is too narrow.

(1) 25 Ch. D. 297.

Lord Justice *Cotton*, in dealing with sect. 41 of the Act of 1852, in his judgment in *In re Knight* (1) says, that section (2) "refers to evidence subsequent to the trial, and provides that it shall be taken as nearly as may be in the same manner as thereinbefore provided with reference to the taking of evidence with a view to the hearing. This makes the expense payable in the first instance by the party cross-examining." That is how Lord Justice *Cotton* reads sect. 41 of the Act of 1852, and I entertain no doubt that is also the proper way of reading rule 21 of Order XXXVII. That rule contains no words of reference; the words "hereinbefore provided" are not there and I think no words of reference were needed, because the rule shews that it is referring to the manner of taking evidence with a view to the trial. To my mind it is clear that the committee, in passing the Rules, intended to repeal the anomalous practice of the past and to provide that the practice of taking evidence by affidavit should be the same both before and after trial.

Mr. *Renshaw's* argument that the present question is a *casus omissus* fails, because rule 21 of Order XXXVII. is an express provision on the point.

Solicitors: *J. S. Coleman*, agent for *Kidson, McKenzies, & Kidson, Sunderland; Botterell & Roche*, agents for *Samuel Alcock, Sunderland.*

(1) 25 Ch. D. 297. (2) 25 Ch. D. 299.

G. M.

NORTH, J.

1885

Jan. 12, 13, 14, 15, 19.

NEWMAN *v.* NEWMAN.

[1883 N. 1256.]

Priority—Incumbrance—Legal Estate—Trustee—Policy—Notice of Charge.

A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.

The note in *Sugden's* Vendors and Purchasers (1) on *Browne* v. *Savage* (2) corrected.

The Act 30 & 31 Vict. c. 144, is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se*. Accordingly where a first incumbrancer on a policy had not given such notice as prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice:—

Held, that the second incumbrancer did not thereby obtain priority.

In the year 1869 a lease of the *New Dynevor Colliery* was made to certain persons, one being *Michael Lewis Brown*, who took three-eighths of the colliery, as to one moiety thereof for himself, and as to the other moiety in trust for *Edwin Newman*.

In 1871 *Brown* had made large advances for the colliery and to *Edwin Newman*, and pressed for payment. By a deed made in July, 1871, after reciting that *Edwin Newman* had a policy on his life for £3000, and had assigned that and also his share in the colliery to his wife's mother, *Sophie Storie Armstrong*, by way of security for £5700, it was witnessed that Mrs. *Armstrong* and *Edwin Newman* assigned the policy and *Edwin Newman's* one moiety of three-eighths of the colliery to *Brown* by way of security for the repayment to him of £3180, and subject thereto for Mrs. *Armstrong*.

Edwin Newman was dead, and a sum representing the £3000 due under the policy had been paid into Court. *Brown* had sold the shares in the colliery, and had a balance of £850 arising from the sale.

This action was brought by *Violet Ida Newman*, one of the children of *Edwin Newman*, against *Brown* and against the ad-

(1) 14th Ed. p. 379. (2) 4 Drew. 635.

ministrator of Mrs. *Armstrong* (who was dead) claiming as against *Brown* that a certain sum of £5700 had priority over his charge on the colliery shares and on the policy money; and that he might be declared a trustee of the colliery shares as to the £5700. The Plaintiff's case was as follows:—

By an indenture of settlement dated the 24th of September, 1856, made on the marriage of *Edwin Newman* with Mrs. *Armstrong's* daughter, certain funds were assigned to three trustees on the usual trusts for Mrs. *Newman*, *Edwin Newman*, and their children, of whom the Plaintiff, *Violet Ida Newman*, was one.

The other trustees died or retired, and in 1866 Mrs. *Armstrong* was appointed sole trustee. The dealings as to the trust funds between Mrs. *Armstrong* and *Edwin Newman* were very complicated and obscure, but it was clear that *Edwin Newman* had borrowed more than £5000 of the trust money from Mrs. *Armstrong;* and, according to the case of the Plaintiff, the £5700 due by *Edwin Newman* to Mrs. *Armstrong*, as stated in the mortgage to *Brown*, was the fund so borrowed and was subject to the trusts of the settlement; and then the shares in the colliery and the policy had been assigned by *Edwin Newman* to Mrs. *Armstrong* by way of security for the trust money which had been advanced by her to *Edwin Newman*.

Brown alleged that he took his charge without any notice whatever of the settlement, and that he thought and still believed that the £5700 was the money of Mrs. *Armstrong*. As to the policy, he made this further defence. Mrs. *Armstrong* had on the 3rd of August, 1870, given the following notice to the insurance office: "Be pleased to take notice that the policy in your office on the life of *Edwin Newman* has been assigned to me." On the 24th of July, 1871, *Brown* gave notice to the office of his charge, stating the date and purport of the assignment as prescribed by 30 & 31 Vict. c. 144, s. 3. This he alleged gave him priority, as the notice given by Mrs. *Armstrong* was informal.

Barber, Q.C., and *R. C. Dobbs*, for the Plaintiff:—

This £5700 will be shewn to have been trust money, and even if *Brown* had no notice of that fact, as to the colliery shares at all events he was trustee for *Edwin Newman* and consequently for the Plaintiff as regards the £5700; and he cannot avail himself

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of his legal estate to support a subsequent charge against his own *cestui que trust.*

Witnesses were then examined for the Plaintiff and for the Defendants.

W. Pearson, Q.C., and *B. B. Rogers*, for *Brown* :—

The evidence is quite insufficient to shew that *Brown* had notice actual or constructive that this was trust money. As to the colliery shares, he was pressing *Newman* for payment, and *Newman* gave him security on property belonging to himself, his mother-in-law postponing her charge on it. Though *Brown* was trustee for all parties, that is no reason why he should not avail himself of his legal estate. There seems to be no precise authority, but the observations of *James*, L.J., in *Phipps* v. *Lovegrove* (1), are very much to the point. If a man has the legal estate in whatever way acquired, it must be shewn that his conscience is affected in order to deprive him of that protection: *Pilcher* v. *Rawlins* (2); *Browne* v. *Savage* (3); *Willes* v. *Greenhill* (4). As to the policy, *Brown* was never a trustee for the Plaintiff. The equitable rules are different as to *choses in action*: *Ex parte Swan* (5). Moreover *Brown* gave to the insurance company the first "written notice of the date and purport of such assignment" according to the terms of 30 & 31 Vict. c. 144, s. 3. The Act goes on to say "and the date on which such notice shall be received shall regulate the priority of all claims under any assignment." This clearly gives him priority, irrespective of the question whether the Plaintiff claiming under Mrs. *Armstrong* can gain any priority, as her charge was postponed.

Lemon, and *Hatfield Green*, for other Defendants.

Barber, in reply :—

In all the cases where a legal estate has proved a protection, some one without notice has got it in, and then the Court declines to take it away from him; but it is quite different when a trustee tries to set up the legal estate against his own *cestui que trust.* If *A.* is the equitable owner of property the legal estate of which is

(1) Law Rep. 16 Eq. 80.
(2) Ibid. 7 Ch. 259.
(3) 4 Drew. 635.
(4) 29 Beav. 376.
(5) Law Rep. 6 Eq. 344.

in *B.*, *A.* can settle it as he pleases and *B.* then becomes trustee for all those interested under the settlement. Or if *A.* mortgages to *C.* so as to give *C.* a right to call for a conveyance from *B.*, and afterwards mortgages to *B.*, *B.* cannot set up his legal estate against *C.* *Browne* v. *Savage* (1) and *Willes* v. *Greenhill* (2) merely decide what is sufficient notice, and were disapproved of by Lord *St. Leonards* in note (*h*) Vendors and Purchasers (3). What has been cited from *Phipps* v. *Lovegrove* (4) is merely a *dictum*. *Prosser* v. *Rice* (5) shews that a legal estate obtained from a trustee will not avail. Here the trustee might have had duties to perform, and then he could not have conveyed the legal estate. A trustee is trustee for all parties according to their priorities. As to the policy of assurance, it is impossible that a man with notice of an existing incumbrance can obtain priority over it by giving a notice in a particular form, and the Act was never intended to have such an effect.

Jan. 19. NORTH, J., after fully stating the complicated facts, and referring to the obscurity of the transactions, continued :—

Now out of that state of facts the questions between the parties arise in this way. First, as regards the shares in the colliery, and, secondly, as regards the policy moneys, which stand in rather different positions. As to the colliery, the question is whether, assuming the £5700 to have been trust money, *Brown's* charge is prior or subsequent to the charge of the £5700. It is quite clear that *Brown* had no notice whatever of the money being trust money, if in fact it was. [His Lordship then referred to some of the evidence.] Therefore it comes to this. *Brown* has got the legal estate, and he had it prior to the charge in 1871. He took that security without notice of any prior charge. But then it is said that there was already a charge in favour of Mrs. *Armstrong*, and that the Plaintiff for whom she was trustee and who claims under her has a charge prior to *Brown's*. *Brown's* answer to that is: "I have the legal estate; and I had no notice of any trust actual or constructive. There was nothing whatever to put me upon

(1) 4 Drew. 635.
(2) 29 Beav. 376.
(3) 14th Ed. p. 379.
(4) Law Rep. 16 Eq. 80.
(5) 28 Beav. 68.

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any inquiry. I dealt with persons who represented this property to be their own, and I had no notice of any sort that either of them was a trustee. I have clearly got a good charge and I have the legal estate. I cannot now be told that my interest is to be postponed to the Plaintiff's when I had the legal estate and dealt with the only persons I knew or could know." It appears to me that even if the £5700 is trust money he is entitled to succeed upon that defence.

The cases in which a second equitable incumbrancer without notice has got in the legal estate and has protected himself are very numerous and well-known. But it is said that the present does not come within these cases, because *Brown* was the trustee of the leasehold interest, and held it in trust for the real owners whoever they were; and that he cannot be heard to say that his own charge which was subsequent in date ought to have priority over the charges of the persons for whom he is trustee. But he is trustee without any notice whatever of any charge, and he dealt with persons who were treated throughout as the only persons interested in the estate. Is there anything to prevent a trustee from dealing with his only known *cestui que trust*, and then taking advantage of the legal estate which he does not get in afterwards but has already.

There are two cases to which I will refer. One is *Phipps* v. *Lovegrove* (1). The Lord Justice *James*, sitting for Vice-Chancellor *Wickens*, says in his judgment (2): "The trustees at the request and by the direction of the only *cestuis que trust* of whom they had any notice or knowledge whatever, dealt with the funds; and it appears to me, upon more than one ground, that any person claiming under the same *cestuis que trust* has no right to make any claim against them. It is a rule and principle of this Court, and of every Court, I believe, that where there is a *chose in action*, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor. Down to the date at which the notice of assignment was given to the trustees, the trustees were at liberty to deal with the fund, and to have equities created in their favour by the *cestuis que trust*, until

(1) Law Rep. 16 Eq. 80. (2) Law Rep. 16 Eq. 88.

they received notice that some other person had come in and displaced those equities. An insurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy, of which no notice had been given to them. Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestuis que trust*, and get a beneficial interest in the trust property, if they have no notice that there have been any prior incumbrances. They have got the legal estate and they have got the legal right; they have therefore got, in respect of the charge created in their favour, before they have got any notice of anything else, a right to retain that which the law has given them." Now it is admitted that this is quite in point, but it was said that the passage referring to trustees who have got the legal estate is merely an illustration by way of *dictum*, and is not necessary for the decision of the case. To a certain extent that is true, but it is an illustration in point and bears upon what the learned Judge decided, and it shews his opinion upon the matter to be that a trustee who had got the legal estate could deal with the *cestui que trust* by buying his interest or making an advance, and could maintain that charge against a prior incumbrancer on the ground that he held the legal estate, provided always that it was without notice.

The case of *Browne* v. *Savage* (1) seems to me very much in point, though it does not refer to the legal estate. There *Kindersley*, V.C., decided that an assignment by one trustee to another, gave that trustee notice, and that at any rate during the life of that trustee the notice so given was all that was necessary, and so it has been held in subsequent cases, of which *Willes* v. *Greenhill* (2) is one. The fact that the trustee to whom the assignment was made, gave no notice till afterwards to the third trustee was immaterial. It was held that the trustee was competent to deal with the *cestui que trust*, and to get a good charge in priority to other charges of which he had no notice, though he was trustee of the fund for the owners of it, including persons in favour of whom charges had been made of which notice had not been given.

(1) 4 Drew. 635. (2) 29 Beav. 376.

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Some little doubt has been thrown upon that case by the remark of Lord *St. Leonards* in a note to Vendors and Purchasers (1). He says: "There is a mistake in the dates; they do not agree with the priorities ordered." But I have looked very carefully at the case, and it seems to me that the note by Lord *St Leonards* is inaccurate, and he seems to have confused the notices and to have thought that the notice given by the second trustee to the third on the 30th of July, 1858, was the ruling notice, whereas the true ruling notice as regards the mortgage of 1858 by *Savage* to the second trustee was not of that date, but was the assignment itself, which was dated the 29th of March, 1858. It seems to me that the decision of *Kindersley*, V.C., was quite accurate, and that the priorities were given according to what he decided to be the right order of the notices. It appears to me, therefore, upon these authorities, that the trustee is entitled to hold the leasehold interest as security for what is due to him in priority to any claim by any *cestui que trust*, even assuming the £5700 to have been trust money.

I now come to the policy, which stands differently. It was assigned to *Brown*, and that he had any actual notice of any trust is clearly disproved, and in my opinion he had no constructive notice either. [His Lordship then stated what the evidence was as to this.] But further, it is said by counsel for Mr. *Brown* that he has obtained priority upon the policy by virtue of a notice given by him under the Act 30 & 31 Vict. c. 144, s. 3. That Act was passed in order to avoid the necessity of joining the assignor of the policy in actions against the insurance office, and it provides that if a certain notice is given to the office then the assignee may sue without joining the assignor. Then these words occur "And the date on which such notice shall be received shall regulate the priority of all claims under any assignment." It was contended that these words went much further than was necessary for the protection of the insurance office, and affected the rights of the parties *inter se*. The argument goes as far as this, that Mrs. *Armstrong* having given an insufficient notice, and *Brown* having afterwards given a statutory notice, their rights must for all purposes be governed

(1) 14th Ed. p. 379.

by the terms of the statute as to priority, although *Brown* had at the time notice of Mrs. *Armstrong's* charge. In my opinion that is not the meaning of the statute, which was not intended to affect the rights of persons claiming interests in the money outside the insurance office. It was intended to give a simpler remedy against an insurance office, and also to give facilities to insurance offices in settling claims by enabling them to recognise as the first claim the claim of the person who first gave such notice as required by the statute. It was not intended in my opinion to enact that a person who had advanced money upon a second charge with notice of the first, and made subject to it, should by giving statutory notice to the office exclude the person who had the prior incumbrance. In my opinion the Act does not apply to the present case.

But then in considering the position of the parties, we have this. No notice was given by the Plaintiff herself, and the only notice which could defeat *Brown's* claim was the notice given by Mrs. *Armstrong*. [His Lordship then shewed that Mrs. *Armstrong* had deliberately postponed her charge to *Brown's* charge, and therefore *Brown* had a charge prior to any charge by any one claiming under Mrs. *Armstrong*. There remained the question whether the £5700, which his Lordship had hitherto assumed to be trust money, was proved, to be so. Mrs. *Armstrong* was dead, and *Newman* was dead, and the evidence was imperfect, but the conclusion to which his Lordship came was that part of the money was clearly not trust money and that there was nothing to establish that any of it was. It had been suggested on behalf of the Plaintiff that there should be an inquiry, but it did not appear that any more evidence would be forthcoming, and his Lordship would not direct an inquiry. The result was that the Court held that *Brown* had a first charge, subject to which the property went to the legal personal representative of Mrs. *Armstrong*.]

Solicitor for Plaintiff: *W. Hays.*

Solicitors for *M. L. Brown: Clayton, Sons, & Fargus.*

Solicitors for the other Defendants: *C. O. Newman; Trinders & Romer.*

C. M.

PEARSON, J.

1881

Dec. 4.

1885

Jan. 13, 14, 24.

In re CUNNINGHAM & CO., LIMITED. ATTENBOROUGH'S CASE.

Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43)—*Immediate Possession—Dock Warrant—Company.*

Bills of sale given by joint stock companies are within the *Bills of Sale Act*, 1882.

Where a security on goods with possession is given the security is valid without registration.

A wharfinger's warrant was indorsed over to a lender with an accompanying memorandum of terms of security including a power of sale:—

Held, that there was a good security which did not require registration.

ON the 3rd of February, 1883, *Robert Percy Attenborough*, a pawnbroker, advanced to *R. N. Cunningham & Co. (Limited)*, the sum of £200 on the security of 400 cases of tin-plates, the property of the company, which were then warehoused at *Brook's Wharf, Upper Thames Street*. At the same time the wharfinger's warrant was indorsed, on behalf of the company, to a Mr. *Wilson*, Mr. *Attenborough's* manager, and was handed to Mr. *Attenborough*, and a memorandum of the terms of the loan, signed by the secretary of the company on behalf of the company, was also handed to Mr. *Attenborough* at the same time. The memorandum was as follows:—

"I have this day deposited with Mr. *Robert Percy Attenborough* the following goods, viz.:—

"Warrant for 400 cases metal to be held by him as a security for the payment of the sum of £200 this day lent by him to me together with interest thereon from the date hereof after the rate of 15 per cent. per annum till payment, such sum of £200 and interest as aforesaid to be also a further charge on all other securities now held or that may be held by him from me, and this security also to be retained by him as a collateral security for the payment of all other advances or debts due or hereafter becoming due to him by me, and if the said sum of £200 and interest as aforesaid be not repaid by the 3rd day of May next and all other sums in which I may be indebted to him as the same become due I do hereby autho-

rize the said *Robert Percy Attenborough*, his executors, administrators, or assigns, to dispose of the said securities or either of them by public sale or private contract, and out of the proceeds thereof to pay all expenses of or incidental to such sale or contract and retain the said amount of £200 and interest as aforesaid until the time of such retainer for so much and such part thereof respectively as shall remain unpaid and any further sum in which I may be indebted to him."

No document connected with the loan was registered as a bill of sale.

This was a summons by the official liquidator of the company to have it declared that the alleged borrowing of £200 on the security of 400 cases of tin plates was void as against the company.

Warmington, Q.C., and *Seward Brice*, for the liquidator:—

Though a bill of sale given by a company is within the mischief aimed at by the law requiring registration, such a bill of sale was held under the Act of 1878 not to be void for want of registration. But the Amendment Act of 1882 alters the law in that respect except in the cases mentioned in sect. 17, for unless ordinary bills of sale were within the operation of the Act sect. 17 would be of no effect.

Nor can a loan by a pawnbroker to a company of this nature be a transaction excepted from the definition of a bill of sale by the words of sect. 4 of the Act of 1878 as being "a transfer of goods in the ordinary course of business of any trade or calling."

The Act of 1882 prohibits all securities except simple pledges, whether possession is or is not given, unless evidenced by a document in the form required by sect. 9 of and given in the schedule to the Act of 1882 and registered as well.

The indorsement and delivery of the warrant might if that had been the whole transaction have constituted a valid pledge but that part of the transaction cannot be separated from the rest: *Ex parte Odell* (1). The memorandum in this case was in effect a regular mortgage with proper mortgage provisions, including a power of sale, which was neither registered nor in the form

(1) 10 Ch. D. 76.

PEARSON, J. required by sect. 9 of the Act of 1882: it was therefore void for two reasons.

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Higgins, Q.C., *Macaskie*, and *Attenborough*, for the lender:—

It was held prior to the Act of 1882 that the *Bills of Sale Acts* did not apply to cases of liquidators: *In re Marine Mansions Company* (1).

The Act of 1882 incorporated the definition of a bill of sale in the Act of 1878; there was no change in that respect. Sect. 17 cannot operate as a positive enactment of what it does not express. The Act being penal is to be construed strictly: *Hough* v. *Windus* (2).

It is not unreasonable that bills of sales by companies should be outside the Acts, because companies are bound to keep their own registers of mortgages.

This is a transaction within the exception in sect. 4 of the principal Act, for it is within the ordinary course of business for a trading company to receive money for a temporary purpose on any of its goods from a pawnbroker or other lender. The exception has always been liberally construed: *Union Bank of London* v. *Lenanton* (3); *Reeves* v. *Barlow* (4).

Supposing the memorandum to be void as a bill of sale under the Act by the delivery and indorsement of the warrant, there was a good pledge, which is not avoided by the fact of there being a collateral security or evidence in writing of the terms of the loan.

A security on chattels, where possession is given to the lender, is not within the mischief aimed at by the Legislature: *Ex parte North Western Bank* (5); *Reeves* v. *Barlow*; *Merchant Banking Company of London* v. *Spotten* (6); *Ex parte Conning* (7).

The whole scope of the Act of 1882 is to exclude the operation of the Act in cases where immediate possession is given. Sect. 7, which provides against possession being taken by the grantee except for specified causes, and the form provided by sect. 9, shews

(1) Law Rep. 4 Eq. 601.
(2) 12 Q. B. D. 224.
(3) 3 C. P. D. 243.
(4) 11 Q. B. D. 610.
(5) Law Rep. 15 Eq. 69.
(6) Ir. R. 11 Eq. 586.
(7) Law Rep. 16 Eq. 414.

that the Act cannot be intended to apply, and so it has been held in the recent case of *Ex parte Close* (1).

Warmington, in reply :—

In the case of *Ex parte Close*, Mr. Justice *Cave* relied too much on the preamble to the repealed Act of 1854, which shewed that the mischief aimed at there was secret assignments of property seeming to belong to the grantor, whereas the more recent legislation has also aimed at the protection of the grantor against the money lender, and makes bills of sale offending against the Act void altogether, not only against creditors, and hits transactions where possession is intended to be given.

This case differs from *Ex parte Close*, in that there the document was mere evidence of the loan, and did not contain any terms, such as a power of sale, consistent only with a mortgage and not a mere pledge, and inseparable from the pledge.

Jan. 24. PEARSON, J. :—

It was argued on the part of the Respondents that the *Bills of Sale Acts* in force do not apply to companies. That seems to me to be an impossible contention, certainly so far as ordinary bills of sale are concerned. A bill of sale by a company must be as much within the mischief of the Act as a bill of sale by a private individual. But the last section of the Act of 1882 contains these words: "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels and effects, of such company." Now, if bills of sale executed by companies generally were entirely out of the Act, that clause was absolutely unnecessary and useless, and therefore, as far as that objection goes, the bill of sale is not rendered a good bill of sale simply because it was given by a company.

But the more serious question, and one which raises a great deal of difficulty, is this, namely, whether the *Bills of Sale Acts* as now in force apply at all to any case in which immediate possession of the goods is given by the grantor to the grantee, and the grantee takes possession of the goods instantly in accordance with

(1) 14 Q. B. D. 386.

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the contract then and there made. We are proceeding now under the Act of 1882. It would be very difficult, I think, to support the contention that the Act of 1854 or the Act of 1878 did not apply to such a case; but under the Act of 1882 it is, to my mind, very difficult indeed to say, whatever the Legislature may have intended, whatever the spirit of the Act may seem to require, and however much the bill of sale was actually executed under circumstances within the mischief intended to be met and struck at by the Acts—it is exceedingly difficult to say that such a bill of sale is comprised within and hit by the terms of the Act at all. A case of this kind came before Mr. Justice *Cave*, and I fortunately have the benefit of his decision, which was given, I think, subsequently to Mr. *Warmington's* opening argument in this case. In *Ex parte Close* (1), Mr. Justice *Cave* says this: "The substantial question is whether the *Bills of Sale Act*, 1882, applies to documents regulating the rights and liabilities of pledgor and pledgee, or is confined to cases where the possession of the goods dealt with by the bill of sale is intended to continue for some time, at all events, in the grantor," and after going through the Acts (I do not read his judgment *in extenso* because I adopt it), and his statement of what he has found in the Acts, Mr. Justice *Cave* says this: "Apart, however, from authority, I am satisfied on the construction of the *Bills of Sale Acts* that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn-tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee."

Now Mr. *Warmington* very properly called my attention to this, that the document in question there, a note entered in a banker's book, and which it was said amounted to a bill of sale, and ought to have been registered, was very different indeed in its terms and in the extent to which it went from the document, which was given by Mr. *Allen* to Mr. *Attenborough* on the 3rd of February in this case. I quite agree that that is so, and it is quite possible that except for the circumstances to which I am about to allude I might have said that Mr. Justice *Cave's*

(1) 14 Q. B. D. 391, 393.

judgment in that case was not the authority on which I ought to decide this case, and that his decision might well stand as a decision on a case different from the present. I admit at once that the document here is a very different document from the document in the case of *Ex parte Close* (1), and I follow Mr. *Warmington's* argument completely in which he says that, looking at the case, if I remember rightly of *Ex parte Odell* (2), and the case before Lord Justice *Lindley* cited in a note to that case (3), I ought to look at this as one transaction. There was the delivery of a warrant, and there was this instrument executed at the same time, and but for the execution of this instrument the loan by Mr. *Attenborough* would not have been effected, and I take them, therefore, as one transaction.

There still remains the question, taking this to be one transaction, whether it is one of the bills of sale which, under the Acts, ought to be registered; and I am met with this difficulty, which I am unable to get over, although I have considered it over and over again in my mind during the course of the argument, and since the argument, that if this instrument is void it must be void, not only because it was not registered, but because it is not in the form prescribed by the Act. That would be a vice as fatal to it as non-registering it. Now the Act prescribes the form which the bills of sale are to take, and the Courts have been very strict indeed in holding parties to the form prescribed by the Act. The last part of the form is in these words: "Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in sect. 7 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882."

Now it was absolutely impossible, looking at what the transaction was, and what it was intended to be between the parties, that any bill of sale of these goods should have contained that clause. Then I am thrown back upon the construction at which Mr. Justice *Cave* arrives, namely, that the *Bills of Sale Acts* were not intended to refer to cases in which the possession of the goods was immediately given to the grantee, and he was directed to

(1) 14 Q. B. D. 386.
(2) 10 Ch. D. 76.
(3) 10 Ch. D. 80, n.

PEARSON,J. retain them; and although this is one transaction, I cannot see that that makes any difference at all.

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I think, therefore, that although this was one transaction the bill of sale in this case was a bill of sale which is not directed to be registered by the Act of Parliament, and although I may therefore be opening the door to transactions against which the Legislature intended to close the door, I do not think I have any right whatever to declare that the bill of sale is void unless I can find that the Legislature has itself declared that such a bill of sale is void.

In coming to the conclusion that this was a transaction to which the Act does not apply, I must also come to the conclusion both that the bill of sale was not necessarily bound to be in the form prescribed by the Act of Parliament, and that it was not necessary to register it. Under these circumstances I must refuse the summons, with costs.

Solicitors for the liquidator: *Bellamy & Co.*
Solicitor for the lender: *S. J. Attenborough.*

D. P.

PEARSON,J.

1884

Aug. 4, 5, 6, 7; *Dec.* 9, 10, 11, 15.

1885

Jan. 27.

FLETCHER *v.* BEALEY.

[1884 F. 983.]

Injunction—Nuisance—Fouling Stream—Quia Timet Action.

In order to maintain a *quia timet* action to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable.

Earl of Ripon v. *Hobart* (1), *Attorney-General* v. *Corporation of Kingston* (2), and *Salvin* v. *North Brancepeth Coal Company* (3) discussed.

The Plaintiff was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which it was essential that the water should be very pure. The Defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about one mile and a half higher up than the Plaintiff's mills, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious

(1) 3 My. & K. 169. (2) 13 W. R. 888.
(3) Law Rep. 9 Ch. 705.

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character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for the Plaintiff's manufacture, and his trade would be ruined. The Plaintiff did not allege that he had as yet sustained any actual injury. The Defendants said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—

Held, that, it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs.

But the dismissal was expressly declared to be without prejudice to the right of the Plaintiff to bring another action hereafter, in case of actual injury or imminent danger.

THE Plaintiff was a paper manufacturer, at the *Kearsley Mills*, situate on the bank of the River *Irwell*, a few miles from *Manchester*. For the purposes of his manufacture he used a large quantity of water, which was pumped from the river and filtered by means of filter-beds on his premises, and, after being used for washing and other purposes, was returned to the river.

The Defendants were alkali manufacturers, their works being situate about six miles higher up the river than the Plaintiff's mills. In the process of their manufacture a large quantity, amounting to many thousands of tons in the course of a year, of a refuse substance, known as "vat waste," was produced. The Defendants had recently agreed with the *Lancashire and Yorkshire Railway Company* to rent from them a piece of land, comprising about three and a half acres, for the purpose of depositing on it their "vat waste." The agreement was terminable by either party by a twelvemonth's notice given at any time. The piece of land was situate on the bank of the river, about a mile and a half higher up than the Plaintiff's mills, and it lay between the river and the bank and retaining wall of a canal which belonged to the company. The Defendants brought the "vat waste" from their works along the canal in barges, and then tipped it over the canal bank on to the land. The bank of the canal at this point was ninety-six feet higher than the river, and the land sloped from the canal bank towards the river. The surface of the land was a loamy gravel, lying on a stratum of clay about fourteen

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feet thick, the clay in its turn lying on a stratum of rock, the slope of which was towards the river.

The Plaintiff by his writ claimed an injunction to restrain the Defendants from sending "vat waste," or refuse, or other matter whatsoever, from their chemical works, or otherwise, into the river, or on to the ground adjacent thereto, or in any way so as to pollute the water to his injury.

The evidence shewed that when a heap of "vat waste" had been deposited there would after a time flow from it a greenish liquid of a very noxious character. This liquid might not flow from the heap immediately after it had been deposited, but it was certain to do so in the course of time, and it might continue to flow from the heap for a period of forty years or even longer. It was admitted that if this liquid was present in the water in any appreciable quantity it would render it entirely unfit for use in the Plaintiff's manufacture. The liquid could not be get rid of from the water by filtration. The Plaintiff said that the result would be utterly to destroy his trade, in which and in the works connected with it he had invested more than £100,000. He did not allege that any injury had yet been done to him, but he said that, when the liquid began to flow from the Defendants' heap, it must almost certainly flow into the river, and moreover, that, as the Defendants were depositing the waste on the land at the rate of 1000 tons a month, they would in ten years' time have deposited on the land as much of the waste as could be placed there, and that they would then probably give up their tenancy of the land, and there would be no one responsible for the proper management of the heap, which would remain, and the Plaintiff would be in greater peril of injury even than during the Defendants' tenancy. The Plaintiff also alleged that, from the nature of the ground, the bank of the river was very liable to slip into the water, and that if it did so, it would carry the heap with it. The Plaintiff also alleged that the retaining wall of the canal bank was very liable to give way; that it had already on several occasions done so, and that, if it should give way at the point where it abutted on the piece of land, it would carry the Defendants' heap into the river.

The Defendants said that they intended so to manage their

heap by means of proper drainage and otherwise, that no appreciable quantity of the liquid which flowed from it should flow into the river. They said that they were about to build a proper retaining wall to prevent the bank of the river from slipping, and that the risk of the retaining wall of the canal giving way was very small.

This was the trial of the action. The effect of the evidence is more fully stated in the judgment.

Cozens-Hardy, Q.C., and *L. Ryland*, for the Plaintiff:—

It may be said that this action is a *quia timet* one, and that the Plaintiff is premature in coming to the Court. But it is clear from the evidence that what the Defendants are doing must necessarily injure the Plaintiff in the course of time, and that he was bound to come to the Court at once. The danger is so imminent that the Court will grant an injunction, even though the injury is only prospective. The injury must come sooner or later, and when it does come it will utterly ruin the Plaintiff's trade. Under such circumstances the Court will grant relief in a *quia timet* action: *Hendriks* v. *Montagu* (1).

[PEARSON, J., referred to *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (2).]

In cases of pollution of a stream the Court will always interfere at an early stage: *Clowes* v. *Staffordshire Potteries Waterworks Company* (3). In this respect such a case differs from an interference with light: *Pennington* v. *Brinsop Hall Coal Company* (4).

Higgins, Q.C., and *Stirling*, for the Defendants:—

This is purely and simply a *quia timet* action; there is no case at all like it in which the Court has ever granted an injunction. It is admitted that there is no present injury. The case is quite different from *Crowder* v. *Tinkler* (5) and *Hepburn* v. *Lordan* (6). In both those cases the defendant was about to commit a wrongful act, an indictable offence, and the injunction was granted on

(1) 17 Ch. D. 638, 646, 650.
(2) Law Rep. 1 Ch. 349.
(3) Ibid. 8 Ch. 125, 142.
(4) 5 Ch. D. 769.
(5) 19 Ves. 617.
(6) 2 H. & M. 345.

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the terms of the plaintiff indicting the defendant. In order to support a *quia timet* action there must be prospective injury about which there can be no doubt. Merely speculative, or possible, or even probable injury will not do. The cases in which the thing threatened is in itself a wrongful act stand on a different footing. The present case is not one of that kind, and the evidence is insufficient to support a *quia timet* action. It is not suggested that the Defendants have violated the provisions of the *Alkali Works Regulation Act*, 1881. The Court will not interfere, even if the threatened act may be illegal, unless it can clearly see that it will be, or it can put the question in a course of immediate trial: *Haines* v. *Taylor* (1). The rule of the Court is clearly laid down in *Salvin* v. *North Brancepeth Coal Company* (2) and *Earl of Ripon* v. *Hobart* (3); there must be either actual damage at the time when the action is brought, either substantial or likely to become so, or there must be a practical certainty that substantial damage is imminent, that it will (not after a long interval of time, but immediately) follow from the act which is complained of. The Plaintiff must shew that the injury which he apprehends will be the inevitable result of the Defendant's acts: *Pattisson* v. *Gilford* (4). *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (5) turned on special circumstances. *Hendriks* v. *Montagu* (6) does not conflict with the previous cases. If the Defendants use proper precautions to prevent the liquid from getting into the river, the mere fact that by an accident some of it may occasionally get there, will not be a ground for granting an injunction: *Cooke* v. *Forbes* (7).

In *Attorney-General* v. *Corporation of Kingston* (8), *Wood*, V.C., said (9): "The difficulty in the way of the plaintiffs was that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere *quia timet* case of injury a hundred years hence, when chemical contrivances might have been discovered for preventing the evil."

(1) 2 Ph. 209.
(2) Law Rep. 9 Ch. 705.
(3) 3 My. & K. 169.
(4) Law Rep. 18 Eq. 259.
(5) Law Rep. 1 Ch. 349.
(6) 17 Ch. D. 638.
(7) Law Rep. 5 Eq. 166.
(8) 13 W. R. 888.
(9) 13 W. R. 891.

The Plaintiff has shewn nothing more than a remote possibility of injury. That is not enough.

[*Rylands* v. *Fletcher* (1) and *St. Helen's Smelting Company* v. *Tipping* (2), were also referred to.]

Cozens-Hardy, in reply:—

The evidence shews a certainty of injury in the course of a few years, and it may come much sooner. *Crowder* v. *Tinkler* (3) was a case of public nuisance, and the decision was only that the Court would not act without the verdict of a jury. The same observation applies to *Hepburn* v. *Lordan* (4). The Court will interfere when there is such a reasonable prospect of injury to health as will amount to an injury to property, as in *Metropolitan Asylum District* v. *Hill* (5). The law is summed up in *Hendriks* v. *Montagu* (6). If the Court is satisfied that injury must result to the Plaintiff within a few years, it will interfere. There has never yet been a case like the present of a substance which may go on doing injury for fifty years; but if the danger is inevitable the element of time is immaterial; it is immaterial whether the injury will take place to-morrow or in ten years. *Attorney-General* v. *Corporation of Kingston* (7) was a very different case. The Defendants will be liable to the Plaintiff if the heap should fall into the river by reason either of the slipping of the ground or of the bursting of the canal bank. The injury would not have happened unless the Defendants had placed the heap on the land: *Tenant* v. *Goldwin* (8); *Humphries* v. *Cousins* (9).

1885, Jan. 27. PEARSON, J.:—

The Plaintiff complains that the Defendants are placing upon a piece of land on the bank of the River *Irwell*, higher up the river than his works, a large mass of a substance called "vat waste," the existence of which in that particular spot will, he says, imperil his trade. He has carried on business for many

(1) Law Rep. 3 H. L. 330.
(2) 11 H. L. C. 642.
(3) 19 Ves. 617.
(4) 2 H. & M. 345.
(5) 6 App. Cas. 193.
(6) 17 Ch. D. 638.
(7) 13 W. R. 888.
(8) 2 Ld. Raym. 1089.
(9) 2 C. P. D. 239.

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years at the *Kearsley Paper Mills*, which are situated upon the bank of the River *Irwell*. The Defendants are alkali manufacturers, their works being on the same river, about six miles higher up the stream. The Plaintiff is a manufacturer of papers of a peculiar description. He says, in one of his affidavits, "I have for many years past especially excelled in trade in the production of the very finest classes of paper which are made in *England*, such as cigarette paper, the finer kinds of copying papers, and fine and delicate tissues of all kinds. For the purposes of my works I use in the making of paper very high class waste and linen, and in the first processes this has to be bleached, after being boiled and beaten up, to as pure a white as it is possible to get, and this is the secret of my success in trade, that I have, by long experience and care in the use of water and chemicals, succeeded in getting a great purity of white to start the process of paper making. Unless I am able to get this pure white for what is known in the trade as bottom, no amount of washing or use of chemicals in the later processes will enable me to get the delicacy of colour shewn in some of the sample-books now produced, and if, in order to get rid of deleterious matter, I have to use too much chemicals in the later processes of washing, it quite spoils the paper by rendering the fibre too tender." The Defendants, as I have said, are alkali manufacturers. In the process of manufacturing alkali, a very large quantity is produced of a refuse which is denominated "vat waste." It contains a considerable amount of sulphur, and is hot, and when heaped up it gets, as I conclude, hotter, and unless great care is taken it will ignite, and if a large heap of this "vat waste" should ignite, the result, as one of the witnesses told me, would be to suffocate all the people in the neighbourhood. It is, therefore, a very dangerous material, and the alkali manufacturers are obliged to be exceedingly careful in the handling of it, and, after a large heap of it, the product possibly of many years, has been stored, there flows from it a liquid of a greenish colour, which contains very destructive chemical elements. The Defendants for some years got rid of this refuse by carting it bodily into the River *Irwell*, but, I think in the year 1881, they were restrained by injunction at the suit of the *Salford* corporation from continuing

that process, and, not having any land in the immediate neighbourhood of their works which is suitable for storing this refuse, they have taken for the purpose, from the *Lancashire and Yorkshire Railway Company*, a piece of land comprising three and a half acres, adjoining the *Bolton, Bury, and Manchester Canal*, which belongs to that company, at *Nob End Wharf*, which is on the bank of the river, and one mile and 740 yards above the Plaintiff's works. The Plaintiff says that if the Defendants proceed to deposit this refuse on this land, depositing, as they do at the present moment, at the rate of 1000 tons a month, the result will be that, sooner or later, there will necessarily come from the heap a large quantity of this green liquid, which will find its way into the River *Irwell*, and, finding its way into the river, it will be carried down to his works, and when he pumps the water from the river he will take in with it this chemical matter which will be destructive to his paper. There is no dispute between the parties that in process of time a liquid of that character does come from these heaps. There is no dispute that if any reasonably large quantity of that liquid should find its way into the Plaintiff's bleaching works, that is, if it should be pumped by him from the river into his reservoir, it would be very destructive to his manufacture. But the Defendants say: "You need be under no apprehension. We have not the slightest intention of injuring you; we intend to conduct our works in such a way that no appreciable quantity of that liquid shall find its way into the *Irwell*, and consequently no appreciable quantity will find its way from our heap into your works."

The hearing of this case was commenced in August last; it was continued in December; and neither in August nor in December was there any allegation that the Plaintiff had, in fact, received any injury from the Defendants' operations. It is admitted that the action is brought, not to obtain damages for a past injury, but to prevent that which is feared as a future injury, or, to use the more technical expression, the action is a *quia timet* action.

That being so, the objection has been taken that, under the particular circumstances of this case, a *quia timet* action will not lie, and, as that seems to me to be really the only point in the

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case, I think that I had better consider, first, what are the rules which have been laid down with regard to *quia timet* actions, and then I will consider whether the evidence in this case brings it within those circumstances which have been held to justify such an action. I need not refer to many of the cases which have been cited, because there is really no dispute as to the law.

The first case I will mention is *Earl of Ripon* v. *Hobart* (1). In that case the parliamentary commissioners for cleansing and improving the river *Witham* and its navigation, and the drainage of the adjacent lands, asked for an injunction against the defendants, who were the trustees for draining another district, and who were commencing to erect a steam engine for pumping water from the fens into the river *Witham*, substituting a steam engine for the power which they had previously obtained by windmills, which had up to that time been used for the purpose. It was said that the steam engine intended to be employed would be equivalent in power to twenty-seven windmills, and that the effect of using a steam engine of that power would be to pump so much water into the navigation as to overpower it altogether. Lord *Brougham*, L.C. said (2): "If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly, in the common course of things, be used without working mischief; if, in short, it be a thing which can scarcely be used without being abused, the case comes to be very different. For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was, in itself, a beginning

(1) 3 My. & K. 169. (2) 3 My. & K. 176.

of injury, though there might be a possibility of otherwise using them; and, if the damage, should it happen at all, were the destruction of the navigation, and the subjecting of the lower districts to a deluge, I might scrutinize less narrowly the probability of the engines being injuriously worked."

In *Attorney-General* v. *Corporation of Kingston* (1) an information had been filed against the corporation of *Kingston*, because they were proceeding to pour a large quantity of sewage into the River *Thames*. They were connecting their own system of drainage with a new main sewer, in such a way as greatly to enlarge the quantity of sewage coming into the River *Thames*. After discussing the Acts of Parliament under which the corporation had power to do this, and concluding that, if they did create a nuisance, they were not justified by the Acts under which they were incorporated, *Wood*, V.C., said (2): "It remained then to be considered whether there was evidence of an actual nuisance committed, or evidence of the extreme probability of a nuisance, if that which was being done was allowed to continue. The difficulty in the way of the plaintiffs was that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere *quia timet* case of injury a hundred years hence, when chemical contrivances might have been discovered for preventing the evil."

Again, in *Salvin* v. *North Brancepeth Coal Company* (3), which was a case of alleged injury to trees and grounds generally by fumes from a chemical factory, and which both *Jessel*, M.R., and the Court of Appeal considered was not made out by the evidence, *Mellish*, L.J., said (4): "The question to be determined is, whether the plaintiff has made out that in an action at law he could recover substantial damages for the nuisance alleged in the bill; and the only real difficulty is in distinguishing how much that proposition depends upon questions of fact, and how much upon questions of law. There is a difficulty in distinguishing precisely what is a question of fact from what is a question of law in these proceedings about nuisances. Indeed, when certain inferences of fact have been established by numerous cases, they become, to a great

(1) 13 W. R. 888.
(2) Ibid. 891.
(3) Law Rep. 9 Ch. 705.
(4) Ibid. 712.

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extent, very nearly of the same authority as if they were propositions of law. For instance, it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere." I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action.

Now the circumstances of the present case are these. In the first place, it is said that, do what the Defendants may, if they proceed to cover, as they propose to do, two acres and a half of the land with this refuse, at the rate of 1000 tons a month, necessarily, although not immediately, there will ooze from the heap a large quantity of this pernicious liquid. Moreover, it is said that, inasmuch as the Defendants have taken a lease of the land from the railway company only for the purpose of depositing this refuse on it, and they have the power of giving up the lease when they have made as much use of the land as they can for the purpose,

at the end of ten years, at which time it is reasonably concluded they will have deposited on the land as much of the refuse as it will hold, they will give up the lease, and then the heap will be left without any person whose duty it is to take care of it, and the liquid will continue to ooze out of it for a period of forty or fifty years, or even longer, and the Plaintiff will be under a risk, an increasing risk, certainly a much greater risk than he incurs at the present moment, of having the water of the *Irwell* polluted, and of pumping into his works the water which is so polluted. The quantity of water which the Plaintiff takes from the *Irwell* is very large indeed, amounting, I think, sometimes to one-third of the water in the river; 1,000,000 gallons in the twenty-four hours.

Now, if that stood alone, would there be a sufficient ground for a *quia timet* action? I think not. There was some conflict in the evidence as to what amount of the liquid would be sufficient to pollute the water so as to injure the Plaintiff. According to the evidence of the Plaintiff, one gallon in 10,000 would be sufficient to produce injury, and it is also in evidence that, if at the end of ten years there were 120,000 tons of the refuse deposited on the land, there would not be less of the liquid oozing from the heap and capable of getting into the *Irwell* than one gallon in a little more than 5000, and of course, if one gallon in 10,000 would be injurious, one gallon in 5000 would be highly injurious. But the answer of the Defendants is this. They do not intend that any appreciable amount of this liquid should get into the *Irwell*, and, inasmuch as it is perfectly practicable, according to all that we know, to prevent the liquid which comes from the heap from getting into the *Irwell*, I cannot think that at the present moment the evidence on this point is sufficient to justify the Court in interfering. In *Attorney-General* v. *Corporation of Kingston* (1), *Wood*, V.C., spoke of injurious results at the end of 100 years. If an injury does result in the present case it will result in a much shorter time, and, if the heap were left alone without any protection to the river to prevent the liquid from oozing into it, I have no doubt that at the end of ten years the water would be polluted sufficiently to do a great amount of injury to the Plaintiff. But *Wood*, V.C., pointed out that in 100 years' time chemical processes might be invented which would

(1) 13 W. R. 888.

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prevent the sewage from doing any injury to the River *Thames*, and I think that in ten years time it is highly probable that science (which is now at work on the subject) may have discovered some means for rendering this green liquid innocuous. But, even if no such discovery should be made in that time, I cannot help seeing that there are contrivances, such as tanks and pumps, and other things of that kind, by which the liquid may, as the Defendants say, be kept out of the river altogether. Therefore, upon that ground alone, I do not think that the action can be supported.

There is another observation to be made on this point of the case. In the first place I think the danger is not imminent, because it must be some years before any such quantity of the liquid will be found issuing from the heap as would pollute the *Irwell* to the detriment of the Plaintiff. And, in the next place, if any such quantity of the liquid did get into the river so as to injure the Plaintiff, I think it would be discovered immediately, and it would be perfectly possible for him then to apply to the Court for relief, and to obtain an immediate injunction restraining the Defendants from allowing the liquid to get into the river. For both these reasons I think there is not sufficient in this part of the case to sustain a *quia timet* action.

The next point raised on behalf of the Plaintiff was this: It was said, and with force and truth, that the piece of land upon which the Defendants are depositing their refuse is not level, but is on a considerable slope from the wall of the canal down to the River *Irwell*. The soil is at the surface loamy gravel; under that is clay, and under that rock. There is very conflicting evidence as to how far there have been slips already, and what probability there is of the land continuing to slip. It was stated by some of the witnesses that the land is full of water. In my opinion the only evidence on which I can rely points to there being one spring of water; of that I think there can be no doubt. There is a spring from which water comes close to the bottom of the tip as it at present stands; it is not yet covered by the heap, but it will be in process of time if the heap is extended, as it seems probable that it will be, and if this water, or any portion of it in the neighbourhood, should get between the clay and the rock, the clay will probably slip and bring everything down with it more or less. It

is said that there is so much danger of the heap of refuse being brought down by the shifting and slippery nature of the ground on which it is being deposited, and, if it does come down, of its going bodily into the river, that I ought on this ground alone to grant an injunction. There is another piece of evidence in support of the Plaintiff's case which I have not overlooked. A little further to the east, not immediately adjoining the piece of land which the Defendants have leased from the company, but a little beyond it, are some mills called the *Cream Paper Mills*, and the evidence of one of the witnesses was as distinct as could be that the tanks which have been made there are perpetually crushing in, and, according to his statement, the land has been slipping for years. On the other hand, with regard to this particular piece of land on which the Defendants' refuse is being tipped, I cannot find from the evidence that any change whatever has taken place at the margin of the river. On the contrary, I am satisfied upon the evidence that there has been no slip of this piece of land such as to alter the contour of the river at that particular spot.

I desire to make two observations upon this evidence. The first is, that, whatever may be the condition of the land in the immediate neighbourhood, I am not satisfied that any slip whatever, or, at all events, any slip of any magnitude, has taken place on this particular piece of land. And, in the next place, I can hardly think, looking at all the evidence, that, if any slip should take place, there would be immediately a slip of such magnitude as, according to the fears of the Plaintiff, would bring the whole heap of refuse at once bodily into the river. I think that, if any slip does take place, there will be some premonitory symptoms which will warn the Plaintiff and the Defendants, and give the Defendants time to do whatever may be necessary to prevent the heap from slipping into the river, and at the same time enable the Plaintiff, if he should think it right to do so, to bring an action against the Defendants on the ground of positive and imminent danger at that time. Moreover, the Defendants say that they propose to do that which their own engineer suggested was necessary, viz., to build a retaining wall along the bank of the river to prevent any slip of the ground. The soil along the bank of the river consists of about fourteen feet of clay over rock. At the bottom of the fourteen feet of clay, which is good puddling

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clay, you come to the rock, and they propose to build a retaining wall along the margin of the river, which the engineer says will be sufficient to prevent any slip. The evidence on this point was most conflicting, the scientific witnesses on the one side declaring that it was perfectly certain that the land would slip, and that the whole heap would before long be brought down bodily into the river, while the scientific witnesses on the other side were equally confident that the land would never slip, and never had slipped. Under these circumstances I cannot say that any case of such imminent danger on this ground has been made out as would entitle me to interfere.

I would also add that, supposing a slip to take place, supposing that to happen which the Plaintiff fears, viz., that the heap is brought down into the river, if it should be a large heap, and it should all come bodily into the river, I imagine the result would be to choke the river and to create a deluge upon the adjoining lands, and in that event the Plaintiff, being one mile and 740 yards lower down, would get ample notice of it long before the water came to him. He would be able to stop pumping, and the damage which would be done to him would be the loss of the power of working for a certain time, a loss which, I need hardly say, would be easily compensated by money.

The third point taken for the Plaintiff is a very curious one, viz., that the wall of the canal is very likely to come down, and, if it falls, it will bring the heap with it, and it will all go bodily into the river. Now the railway company, who are the owners of the canal, seem, so far as I can judge from the evidence, to have had a great deal of trouble with this wall. The wall, as I gather, has fallen at least three times, once a great many years ago, and twice more recently. It fell, I think, in 1876, and it fell again curiously enough confirming the predictions of the Plaintiff's witnesses, between the month of August, when the trial of this action was commenced, and the month of December, when the hearing was resumed. In August the Defendants' witnesses magnified the beauty and excellence of this wall, and said that it had been built with the greatest possible care at an expense of £20,000, and that it would stand as long as the world lasted. But, notwithstanding, in the month of October, another fall occurred. I think, however, that that fall arose from a temporary

accident or blunder. Some alterations were being made in the bank of the canal, and the water was carelessly allowed to get on to the newly-made ground, between the canal and a part of of the wall, so as to soak all the new earth, and that, pressing with an enormous weight upon a portion of the new wall, broke it, and carried the *débris* right across the river. This is the same part of the wall which broke on a former occasion, and it is said that the wall immediately behind the heap, and from which the refuse is tipped over, is in a dangerous condition, and is likely, or, as the Plaintiff would say, is certain to break, as the other part of the wall did, and, if it breaks the result will be that the heap must be carried into the river. I do not know how I am to arrive at any conclusion as to the certainty of the wall breaking. It may or it may not break, and, even if it does break, it may break in such a way as not seriously to move the heap, and I think I may fairly take this into account, that the wall belongs, not to the Defendants, but to the railway company, and is put there for the support and maintenance of the canal which the railway company are bound to maintain. It has been built with the greatest care, and they have spent a large sum of money upon it. It is their interest to keep the wall in as good a condition as possible, because, if that should happen which the Plaintiff fears and predicts, the railway company, as I understand, would have no choice, but would be obliged to replace the wall at any expense. They are bound to keep up the canal, and, if they are careless about the wall, they will put themselves to a most serious loss.

Now, under these circumstances, am I to consider that there is an imminent danger to the Plaintiff, or one which will produce irreparable mischief to him, if it should happen? I am unable to say on the evidence before me that the danger is imminent, because it does not follow that the wall, which has broken twice in a different place, will on the next occasion by a freak of fortune break immediately behind the heap. Nor does it follow that, even if it does break there, it will break to such an extent and in such a way as to carry the heap bodily into the river, for, even on the occasion when it broke, not from what I may call natural causes, but from a blunder, or mismanagement of the canal, a large proportion of the wall was left standing for some

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distance above the ground, and, if the wall should be left standing for a considerable distance above the ground behind the heap, it does not at all follow that all the mischief which the Plaintiff anticipates would occur. I cannot, therefore, in the present state of things say that the danger on this ground is so imminent as to justify me in granting relief in a *quia timet* action.

I think the Plaintiff has been premature in bringing his action, and that, according to the rules which have been laid down (and I cannot go beyond precedent), I must refuse to grant an injunction, and I believe, according to the practice in these cases, I have no choice but to dismiss the action with costs. But I observe that in *Attorney-General* v. *Corporation of Kingston* (1), *Wood*, V.C., guarded the dismissal of the information by a declaration of the right of the plaintiff to bring another action thereafter if there should be actual damage, or damage which he could prove to be imminent or likely to be irreparable. The Vice-Chancellor said (2): "The proper course would be to dismiss the information, such dismissal being prefaced by a declaration that the Court was of opinion that the evidence did not establish the existence of any nuisance in respect of the works executed, or intended to be executed, by the defendants, or any case for the interference of the Court in respect of nuisance to be apprehended, if such works were carried into effect. The order would be without prejudice to any future proceedings on the part of the Attorney-General in case the works should occasion a nuisance." Though I do not think it is necessary, yet, if the Plaintiff's counsel desire it, I have no objection to inserting a similar declaration in the order which I am now making.

Cozens-Hardy said that he wished to have the declaration inserted.

Solicitors for Plaintiff: *Clarke, Woodcock, & Ryland*, agents for *Holden & Holden, Bolton.*

Solicitors for Defendants: *Cunliffe, Beaumont, & Davenport*, agents for *Cunliffe, Leaf, & Co., Manchester.*

(1) 13 W. R. 888. (2) 13 W. R. 892.

W. L. C.

PEARSON, J.

1885

Jan. 28.

In re YOUNG.
TRYE *v.* SULLIVAN.

[1883 Y. 45.]

Husband and Wife—Joint Investments—Survivorship—Separate Estate.

Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—

Held, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will.

THIS was a special case stated under Order XXXIV., rule 2, of the Rules of the Supreme Court, 1883.

By an indenture dated June, 1846, made in contemplation of the marriage of the late Colonel *James Young* with *Anne Eliza Longworth*, certain personal estate was settled in default of children on trust after the death of the survivor of the said *James Young* and *Anne Eliza Longworth*, in case the said *James Young* should die in the lifetime of the said *Anne Eliza Longworth*, for the said *Anne Eliza Longworth*, her executors, administrators, and assigns. But in case the said *Anne Eliza Longworth* should die in the lifetime of the said *James Young*, upon such trusts as the said *Anne Eliza Longworth* should by deed or will appoint. There were no children of the marriage. Mrs. *Young* made a will, dated the 31st July, 1879, which after reciting the settlement proceeded as follows:—"Now therefore I do hereby in pursuance of the said power, and of all other powers enabling me in that behalf, appoint, devise, and bequeath all the moneys, funds, and property which I have power to dispose of by the said settlement or otherwise" to her executors, the Rev. *Charles Brandon Trye*, *William Henry Lloyd*, *Henry Norwood Trye*, and *Henry Sullivan*, upon certain trusts, including a trust to pay and transfer the residue, after providing for specific and pecuniary legacies, to *Charles Brandon Trye*, and *William Henry Lloyd*, equally.

Within a few months after the marriage Colonel and Mrs. *Young* opened a joint account at the *County of Gloucester Bank, Cheltenham*, on which each had power to draw. Colonel *Young* continued to

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keep his own account at Messrs. *Roberts*, the firm he banked with before his marriage. Mrs. *Young* had a separate account at the *County of Gloucester Bank*, and later on there was also opened a joint interest account.

The moneys credited to the joint account were chiefly derived from Mrs. *Young's* separate income. The greater part of the household expenses were paid out of the joint account, the remainder being paid out of Mrs. *Young's* separate account. Colonel *Young* drew on the joint account for his private expenses, and also paid for large investments made in his own name by drawing on that account. In the year 1872, £1500 *Lancashire and Yorkshire Railway* debenture stock, and £90 *Midland Railway* ordinary stock were purchased and transferred into the joint names of Colonel and Mrs. *Young*, and always remained so. The purchase-money of the £1500 debenture stock, and half that of the £90 *Midland Railway* stock was derived from the joint account, the other half of the purchase-money of the £90 stock was paid for by Mrs. *Young* by drawing on her private account.

Colonel *Young* died in 1882. Mrs. *Young* died five days after him without having re-executed her will.

The Plaintiff in the special case was *C. B. Trye*, the Defendants being the other residuary legatee, the representatives of Colonel *Young*, and the next of kin of Mrs. *Young*.

Among the questions submitted for the decision of the Court were whether the sum of £1500 *Lancashire and Yorkshire Railway* debenture stock, and £90 *Midland Railway* stock, standing in the joint names of Colonel and Mrs. *Young*, and the balances standing to the credit of the joint accounts at the *County of Gloucester Bank*, survived to Mrs. *Young*, and if so, whether they passed by her will and belonged to the residuary legatee, or whether they belonged to her next of kin.

Cozens-Hardy, Q.C., and *Birrell*, for the Plaintiff, the representative of the legatee of half the residue, and *G. H. Lea*, for the other residuary legatee:—

The money on the joint accounts was joint property going to the survivors, but the interest of Mrs. *Young* was in one sense a separate interest; as she had power to draw separately, the

proper inference to be drawn from the acts of the parties is that it was intended that Mrs. *Young's* right to take the whole on the contingency of her surviving was an interest in the nature of separate estate, which she could dispose of during coverture.

With respect to the railway stock invested in the joint names, either the same inference is to be drawn—or perhaps the right view is that the investments were intended entirely for Mrs. *Young's* benefit, and were placed in the joint names merely for convenience and to ear-mark them as distinct from the investments made in Colonel *Young's* name, and were her separate property.

Cookson, Q.C., and *P. V. Smith*, for the representatives of Colonel *Young*:—

The whole of the circumstances taken together shew that the money on the joint accounts was appropriated to the use of Colonel *Young*, and that it was placed in the joint names merely for the convenience of dealing with it, and to enable Mrs. *Young* to make payments on behalf of her husband out of his money: *Marshal* v. *Crutwell* (1).

Everitt, Q.C., and *Dauney*, for Mrs. *Young's* next of kin:—

The joint interest in the railway stock and the joint banking accounts were subject to the incidents of ordinary joint interests, and the whole interest accrued to the survivor. The interest which so accrued to Mrs. *Young* after the death of her husband could not be separate property belonging to her during coverture which she could dispose of by will during coverture: *Mayd* v. *Field* (2).

Warmington, Q.C., *J. W. Brodie Innes*, *Borthwick*, *Woodroffe*, *Chadwyck Healey*, and *Swinfen Eady*, for other parties.

Cozens-Hardy, in reply.

PEARSON, J.:—

Colonel and Mrs. *Young* seem to have lived for many years a married life such as married people ought to live, on terms of

(1) Law Rep. 20 Eq. 328. (2) 3 Ch. D. 587.

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affection and mutual confidence, and I can well understand that the lady, with a delicacy that I hope is not uncommon, felt that it would be unpleasant for her husband to be reminded from day to day that he was living to a great extent upon and drawing a large share of the money required for household expenses from his wife, and for that reason this joint account seems to me to have been opened, which was used to a great extent for household expenses. That being so, the inference I draw is that it was simply intended that the account should be joint, and the lady intended to sink all idea of separate character in order that her husband should be able to draw. The husband did draw, and, as I must hold, with the consent of his wife has invested from time to time a large portion of the sums drawn in his own name. There is no dispute as to such investments that they must be treated as his property.

Mr. *Hardy* has argued with great skill that the proper inference from the investment in the joint names was that though the lady was willing to dispose of and allow her husband to dispose of the joint funds in household expenses and his private investments, she drew a limit to that application, and that a certain portion of the money so paid in was to be invested in the husband's and wife's names; that it should be ear-marked as the wife's separate property. I can arrive at no such conclusion. I think that just in the same way as the joint account was in every sense joint, with power to each party to draw and free from any idea of separate estate, so the joint investment was subject to the ordinary incidents of a joint investment. The whole circumstances of the case impress my mind, without any doubt or uncertainty, with the conviction that it was intended that whichever survived was to have the benefit of the investment. I do not believe that the lady had the slightest intention or wish that if she died in the lifetime of her husband he should not have the investment, nor do I believe that there was any intention that if she survived the debenture stock should be ear-marked so as to be subject to the incidents of her separate property. To my mind the moment you come to the conclusion that the joint account was kept in order to be used by either party (each party having perfect confidence in the other that it would be used with perfect propriety) without any distinction as to the sources from which it arose, it is very difficult to

suppose that any purchase made from it was to have a different nature.

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TRYE *v.* SULLIVAN.

Solicitors for Plaintiff and some Defendants: *H. C. Nisbet & Daw*, agents for *Bubb & Co., Cheltenham.*

Solicitors for the other Defendants: *H. C. Nisbet & Daw; Shoubridge & May; Sole, Turner, & Knight*, agents for *Merlin Fryer, Exeter; Street & Poynder.*

D. P.

In re PRICE.
STAFFORD *v.* STAFFORD.

[1884 P 2772.]

PEARSON, J.
1885
Feb. 9.

Will—After-acquired Property—Married Woman—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 23—*Wills Act* (1 *Vict. c.* 26) *s.* 24, [*Revised Ed. Statutes, vol. viii., p.* 34].

Sect. 1, sub-sect. 1, of the *Married Women's Property Act*, 1882, gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture.

Consequently, notwithstanding sect. 24 of the *Wills Act*, her will made during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end.

ADJOURNED SUMMONS.

Sarah Price, the wife of *William Price*, by her will dated the 19th of January, 1884, after making some specific bequests, bequeathed all the rest, residue, and remainder of her estate and effects, as to one equal half part thereof, to her sister *Margaret Stafford*, and as to the other half part thereof in equal shares amongst the nephews and nieces of the testatrix named in the will.

The husband of the testatrix died on the 26th of January, 1884, having by his will bequeathed the residue of his personal estate to his wife. The testatrix died on the 29th of January, 1884, without having re-executed or republished her will after the death of her husband. Her will was proved by her executors

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in the district registry of the Probate Division at *Liverpool*. The Registrar was of opinion that the will did not operate to pass the property bequeathed to the testatrix by her husband, and consequently only a limited probate was granted. But the property of the testatrix was estimated for probate duty at £2308, and this sum included the estimated value of the residue of the husband's estate. The testatrix at the date of her will and at the time of her death was entitled to a sum of money which was deposited in her sole name with the *Manchester and Liverpool District Bank*.

An originating summons was taken out by the executors of the testatrix as Plaintiffs, against *Margaret Stafford*, *Elizabeth Ashton*, one of the next of kin of the testatrix, and *Matthew Ferguson*, the executor of the husband's will, as Defendants, to have it determined whether the residue of the husband's estate was payable to the Plaintiffs as executors of the testatrix, or whether she died intestate as to that residue.

C. Lyttelton Chubb, for the Plaintiffs:—

Sub-sect. 1 of sect. 1 (1) of the *Married Women's Property Act*, 1882, has altered the law which was laid down in *Willock* v. *Noble* (2), that, notwithstanding sect. 24 of the *Wills Act*, the will of a married woman executed during coverture, did not operate to pass property acquired by her after the death of her husband, unless the will was re-executed after the husband's death.

Ralph Neville, for the legatees under the wife's will:—

Sect. 1, sub-sect. 1, of the Act means that a married woman shall be capable of disposing of property just as if she were a *feme sole;* the addition of the words "as her separate property, and without the intervention of any trustee," does not limit the

(1) Sect. 1, sub-sect. 1: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 23, "For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

(2) Law Rep. 7 H. L. 580.

operation of the prior words. The words are clear, and they are not limited to separate estate. Therefore sect. 24 of the *Wills Act* applies, and makes the will effectual to pass all after-acquired property, just as the will of an unmarried woman would.

[PEARSON, J.:—What is the effect of sect. 23? It seems to shew that sect. 1 was dealing only with separate estate of the married woman.]

It is not sufficient to cut down the clear words of sect. 1.

Method, for the next of kin of the wife, was not heard.

T. B. Napier, for the husband's executors.

PEARSON, J. (after stating the facts):—

The question is whether the will of Mrs. *Price*, made while she was a married woman, and not re-executed by her after the death of her husband, was effectual to dispose of property which she acquired under the will of her husband. It is admitted that, but for the Act of 1882, the effect of the decision in *Willock* v. *Noble* (1) is that the will would not pass the property which she took under her husband's will. But it is said the Act of 1882 gave the testatrix a power which she did not before possess. If any power at all was given to her it was given by sub-sect. 1 of sect. 1 of the Act. My first impression on reading that sub-section is that it cannot apply to any property but that which is held by the married woman while she is under coverture; the words "acquiring" and "holding" manifestly apply to her during coverture. Do the words "disposing by will" apply to property which she may acquire after she becomes discovert? To my mind they do not. It was, of course, necessary to use the words "disposing by will," because the property which she had during coverture might be disposed of in some other way; but it was only necessary to give her a power of disposition during coverture, because the moment she became discovert she had power to dispose of her property without the aid of any statute. Looking at sub-sect. 1 of sect. 1 alone, I should have thought that it only applies to a disposition by a married woman during

(1) Law Rep. 7 H. L. 580.

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coverture of property which she then has. But when I look at the other sections of the Act, all doubt is removed. Sects. 2, 3, and 4, for instance, all, as it seems to me, apply only to things which are to be done by the married woman during the coverture. The only other section which has any reference to a disposition by will is sect. 23, which cannot possibly refer to anything but separate property, as it does in express words, and there can be no separate property after the woman becomes discovert. In my opinion sub-sect. 1 of sect. 1 applies only to what is done by the married woman during coverture in relation to property of which she is then possessed. Consequently *Willock* v. *Noble* (1) applies, and the will, not having been re-executed after the husband's death, does not pass the property which the testatrix acquired under her husband's will.

Solicitors for Plaintiffs and other parties: *Kime & Hammond*, agents for *Buck, Dicksons, & Cockshott, Southport.*

Solicitors for next of kin: *Gregory, Rowcliffes, & Co.*, agents for *Parr, Sadler, & Dickinson, Southport.*

W. L. C.

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HARDMAN *v.* CHILD.

[1884 H. 669.]

Vendor and Purchaser—Specific Performance—Contract for Sale of Land—Conditions—Objection to Conveyance—Vendor's Right to rescind.

Trustees of a will put up land for sale, subject to a condition that, if any objection or requisition as to (*inter alia*) title, or abstract, or conveyance should be insisted on, and the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the sale. The abstract delivered to the purchaser shewed that the conveyance to the vendors' testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired and kept in repair" by the testator, his heirs, and assigns. This obligation was not mentioned in the particulars and conditions of sale, and the purchaser did not know of it until the delivery of the abstract. He accepted the title, and tendered to the vendors the draft of a conveyance to himself of the land with the wall, omitting all reference to the obligation to repair the wall. The vendors' solicitors added the words "subject to and with the liability for ever to repair the wall" by the purchaser, his heirs and assigns. The purchaser

(1) Law Rep. 7 H. L. 580.

would not agree to the addition, and the vendors thereupon gave notice to rescind the contract. The purchaser then brought an action for specific performance of the contract, claiming the right to a conveyance without the additional words:—

Held, that, if the obligation to repair the wall ran with the land, it was immaterial whether it was mentioned in the conveyance or not, because the purchaser would be bound by it in either case; but that, if it did not run with the land, the vendors, not having mentioned it in the particulars of sale, could not impose it on the purchaser. Consequently, the vendors were not entitled to rescind the contract.

Semble, that a condition of sale giving the vendor a right to rescind the contract, in the event of his being unable or unwilling to comply with a purchaser's requisition as to conveyance, is not in general a proper condition.

ON the 18th of June, 1884, the Defendants, *William Child* and *John Child*, who were trustees for sale under the will of *Samuel Child*, offered for sale by auction in lots some land near *Bristol*, subject to certain conditions. The 5th condition provided as follows:—"Every objection or requisition to or in respect of the title or the evidence thereof shall be delivered in writing to the vendors' solicitor within fourteen days after the actual delivery of the abstract, and in this respect time shall be of the essence of the contract. In default of such objections and requisitions, or subject to such, the purchaser shall be deemed to have accepted the title, and if any objection or requisition, either as to the title or abstract or evidence of title, particular, conditions, quantity of estate or interest, conveyance, or otherwise, shall be insisted on, and the vendors be unable or unwilling to remove or comply therewith, they shall be at liberty at any time, notwithstanding any attempt to do so or correspondence thereon, by notice in writing to the purchaser, or his solicitor, to annul the sale, and will return the deposit money, but without any interest, fees, costs of investigating the title, or other compensation or payment whatever." The particulars of sale stated that the vendors were trustees. At the sale *J. W. Hardman* was declared the purchaser of Lot 2, which was a piece of pasture land, called *Innocks*, and he signed an agreement and paid a deposit accordingly. An abstract of title was delivered to the purchaser, and from this abstract it appeared that the conveyance to the vendors' testator of the piece of land which formed Lot 2 contained these words:

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"together with the appurtenances, and particularly the wall-fence on the eastward side of the said close of land and dividing it from the adjoining close, which wall-fence is to be for ever hereafter repaired and kept in repair by the said *S. Child*, his heirs and assigns." This liability was not mentioned or referred to in the particulars or conditions of sale, and the purchaser was not aware of its existence until the delivery of the abstract. The purchaser accepted the vendors' title and tendered to them a draft of a conveyance to himself. This draft did not contain any reference to the obligation to repair the wall-fence, but simply contained a conveyance to the purchaser of the land, "together with the wall-fence on the eastward side of the said close of land and dividing it from the adjoining close called the *Hither* or *Lower Innocks*." The vendors' solicitors added the following words: "subject to and with the liability for ever to repair such wall-fence by the said *J. W. Hardman*, his heirs and assigns." The purchaser objected to the insertion of these words; the vendors insisted on their insertion, and, as the purchaser would not agree to accept them, the vendors, on the 28th of July, 1884, gave the purchaser notice to annul the sale, and tendered him his deposit. The purchaser then commenced this action, claiming a declaration that the Defendants were not entitled to rescind the agreement, and that the alleged rescission was ineffectual and void; specific performance of the agreement; and that the Defendants might be ordered to execute a conveyance to him in accordance with the draft as it originally stood, or with the omission of any reference to the wall-fence, but at any rate with the omission of the words added by the vendors' solicitors.

This was the trial of the action.

Upjohn, for the Plaintiff:—

The 5th condition does not apply to a case in which the vendors have themselves created the objection by insisting upon inserting in the conveyance something to which they are not entitled. The obligation to repair the wall is not one which runs with the land, and, if it does, the vendors are not entitled to have a new contract binding the purchaser inserted in the conveyance, no notice of the existence of the obligation having been contained

in the particulars or conditions of sale: *Andrew* v. *Aitken* (1); *Haywood* v. *Brunswick Permanent Benefit Building Society* (2); *In re Monckton and Gilzean* (3).

Dunning, for the Defendants:—

The 5th condition applies, and the vendors were justified in rescinding. The obligation to repair the wall was not stated in the conditions of sale, because the trustees were not aware of it. The testator's estate will remain liable if the proposed words are not inserted in the conveyance.

[PEARSON, J.:—Why should not the words "if any" be inserted after the word "liability"?

Both parties agreed to this.]

The question as to the right to rescind must still be determined, in order to decide who is to pay the costs of the action, and this depends on the 5th condition.

[PEARSON, J.:—I never saw the word "conveyance" in a condition of this kind before.]

It is the common practice now to insert it: *Davidson's* Conveyancing (4). The condition applies to what has happened. The purchaser refused to consent to the words which the vendors inserted in the draft of the conveyance; that was a requisition of the purchaser with which the vendors were unwilling to comply, and the vendors then had a right to rescind.

[PEARSON, J.:—You had not told the purchaser of the existence of the obligation.]

The abstract shewed it, and with full knowledge of its existence the purchaser accepted the title. He is not entitled to have the property conveyed to him free from the obligation if it exists. It may not run with the land: *Haywood* v. *Brunswick Permanent Benefit Building Society*. If it does run with the land, it is not very material what the form of the conveyance is.

Upjohn, in reply:—

The words which it was proposed to insert imposed a personal

(1) 22 Ch. D. 218.
(2) 8 Q. B. D. 403.
(3) 27 Ch. D. 555.
(4) 4th Ed. vol. i. p. 621.

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liability on the purchaser, and this the vendors had no right to ask for: *In re Monckton and Gilzean* (1). By accepting the title the purchaser may have accepted any obligation which runs with the land, but he did not accept a collateral obligation to indemnify the vendors or their testator's estate. This is a requisition made by the vendors, and condition 5 does not apply to it. The condition is intended to apply to such a case as this—if the purchaser had required that the representatives of the original obligee should join in the conveyance in order to release the obligation. The obligation does not run with the land, but, if it does, the purchaser will be liable only so long as he holds the land. If he makes himself expressly liable, he will remain liable even if he parts with the land. *Spencer's Case* (2) does not apply, because this is not a demise. Except in the case of a lease the burden of a covenant does not run with the land, though the benefit does: *Dennett* v. *Atherton* (3).

[PEARSON, J.:—What difference does it make, if the purchaser cannot trace his title without the deed which contains the covenant?]

The distinction is clearly laid down in the cases: *Barclay* v. *Raine* (4); *Haywood* v. *Brunswick Permanent Benefit Building Society* (5); *Milnes* v. *Branch* (6); *Andrew* v. *Aitken* (7); *Keppell* v. *Bailey* (8).

Feb. 14. PEARSON, J.:—

This is an action by a purchaser against his vendors for the specific performance of a contract for the purchase of land. There is nothing now to be determined but the question which of the parties ought to bear the costs of the action. But, in order to determine that question it is necessary to consider which of the parties is to blame. Now, from the abstract of title which was delivered by the vendors to the purchaser, it appeared that the conveyance of the property to *Samuel Child*, under whose will the vendors were trustees for sale, contained these words, "together

(1) 27 Ch. D. 555.
(2) 5 Rep. 16 a.
(3) Law Rep. 7 Q. B. 316.
(4) 1 S. & S. 449.
(5) 8 Q. B. D. 403.
(6) 5 M. & S. 411.
(7) 22 Ch. D. 218.
(8) 2 My. & K. 517.

with the appurtenances, and particularly the wall-fence on the eastward side of the said close of land, which wall-fence is to be for ever hereafter repaired and kept in repair by the said *S. Child*, his heirs and assigns." After examining the title the purchaser satisfied himself that, if there was any liability to repair the wall, it did not amount to a covenant running with the land. He accordingly prepared the draft of a conveyance to himself, making it a conveyance *simpliciter* of the land together with the wall, and ignoring altogether the liability to repair the wall. The vendors objected to this, and they inserted these words: "subject to and with the liability for ever to repair such wall-fence by the said *J. W. Hardman*, his heirs and assigns." Thereupon a controversy arose whether those words should or should not be inserted. The vendors insisted upon the addition, the purchaser would not agree to it; the vendors then said that they were entitled to rescind the contract, and they gave notice to rescind it accordingly. The purchaser then brought this action. The vendors claimed the right to rescind the contract under the 5th condition of sale. [His Lordship read the condition.] Now I do not intend to decide whether the obligation to repair the wall contained in the conveyance to the testator did or did not amount to a covenant running with the land; having regard to the modern cases on the subject it seems to me that it is a matter of great difficulty to decide whether a covenant does or does not run with the land. But it appears to me that in the present case that question is wholly immaterial. If the obligation to repair the wall did run with the land it would bind the purchaser, whether there was any reference to it in the conveyance to him or not. If it did not run with the land the vendors had no right to insert any words in the conveyance imposing the obligation on the purchaser. Neither the particulars nor the conditions of sale contained any notice of the obligation, and the purchaser was therefore entitled to say to the vendors, You have contracted to sell me the property with a free title. The question, therefore, arises whether the purchaser was entitled to insist on having the property conveyed to him free from this obligation, or whether the vendors were entitled under the 5th condition to rescind the contract. In my opinion the vendors were not entitled to rescind. I

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regret exceedingly to hear that it is now a common practice to insert a condition providing that if the purchaser shall insist on any objection or requisition as to the conveyance which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty to rescind the contract for sale. Only one case occurs to me in which it would be proper to insert such a condition. If the sale were made by trustees the purchaser might require that the persons beneficially interested in the property should be made parties to the conveyance to him, and I can conceive it possible that the vendors might not be able to procure their concurrence. In such a case it might be very reasonable that the vendors should be able to say to the purchaser, You may be in strictness entitled to have the concurrence of the beneficiaries, but you will get a perfectly good title without it, and as we are unable to procure their concurrence we will rescind the contract. But, even in such a case as that, the conditions of sale, if they were properly drawn, would provide that the purchaser should be satisfied with a conveyance from the trustees. In the present case I think there was no ground for rescinding the contract; the matter in dispute could have been decided by means of a simple summons under the *Vendor and Purchaser Act*. A condition of this kind is, in my opinion, intended only to meet the case of a purchaser insisting on an objection which the vendor is absolutely unable to remove; or, if not absolutely unable, the removal of which would throw upon him such an amount of expense as it would be unjust that he should be compelled to bear. In my opinion the present vendors were in the wrong; they have brought about the litigation, and they must pay all the costs of it.

Solicitor for Plaintiff: *R. F. Brunskill*, agent for *Bramble & Watts, Bristol.*

Solicitors for Defendants: *Meredith & Co.*, agents for *Perham, Bristol.*

W. L. C.

In re WARD.

PEARSON, J.

1885

Feb. 14, 16, 17.

[1884 W. 3354.]

Solicitor and Client—Costs—Taxation—"Assignee" of Costs—6 & 7 Vict c. 73, *s.* 37 [*Revised Ed. Statutes, vol. ix., p.* 128.]

Whether an assignee of costs due to a solicitor is such an "assignee" of the solicitor as is, under sect. 37 of the Act 6 & 7 Vict. c. 73, entitled to obtain a taxation of the costs, *quære.*

But, if an assignee of costs can obtain a taxation, he cannot obtain an order of course to tax one bill of costs out of several, even if that bill only has been assigned to him. An order to tax one bill out of several alone can only be obtained by means of a special application.

THIS was a motion to discharge an order for the taxation of a solicitor's bill of costs which had been obtained *ex parte* in the common form.

The order was made on the petition of *Alexander Ward, Thomas Burden, E. T. Hamilton,* and *Henry Bennett,* the last three Petitioners describing themselves as the executors of *W. H. Stemp,* deceased. The petition contained statements to the following effect.

J. S. Ward was employed by a company called the *Alcazar (Limited),* to transact various matters of business for them between the years 1880 and 1882, and he transacted the business accordingly. On the 5th of July, 1883, he by deed assigned to *Alexander Ward* and *W. H. Stemp* all such costs as were then due to him from the company. Notice of the assignment was given to the company. *Stemp* died on the 23rd of January, 1884. On the 1st of July, 1884, the Petitioners caused a bill of the charges of *J. S. Ward,* for conveyancing and other miscellaneous matters, to be delivered to the company, the bill being signed by *J. S. Ward,* and also by *Alexander Ward* and *E. T. Hamilton* (for himself and his co-executors) as assignees from *J. S. Ward* of the bill of costs. On the 30th of August, 1884, the Petitioners delivered to the company a cash account between *J. S. Ward* and the company, the account being also signed by *J. S. Ward, Alexander Ward,* and *E. T. Hamilton.* The company had not

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paid the bill to the Petitioners, nor had they taken any steps to get the same taxed.

The order to tax was dated the 20th of January, 1885, and, after reciting the statements in the petition, it ordered that it should be referred to the Taxing Master to tax and settle the bill, and that the Petitioners should give credit for all sums of money by them, or by *J. S. Ward*, or *Stemp*, or any of them received, for or on account of the company, and the Petitioners should be at liberty to charge all sums of money paid by them, or by *J. S. Ward*, or *Stemp*, or any of them, to or on account of the company. And it was ordered that the Master should certify the amount due from the company to the Petitioners, or from the Petitioners to the company (as the case might be), having regard to the costs of the reference, and to any sum or sums of money which might have been so received or paid as aforesaid. And it was ordered that the amount so to be certified should be paid, within twenty-one days after service of the order and of the Taxing Master's certificate, by the party from whom to the party to whom the same should be certified to be due, unless the Court should, upon special circumstances to be certified by the Master, otherwise order, upon application to be made, within one week after the date of the certificate, by the party liable to pay such amount.

The company moved to discharge the order, and in support of the motion an affidavit was made by the managing clerk of their solicitors. This affidavit contained the following statements.

On the 25th of September, 1884, an action was brought by *J. S. Ward* against the company to recover the amount of the bill of costs referred to in the order to tax (and in the statement of claim described as a bill of costs delivered on the 26th of June, 1884), which was stated at £811 4*s.* 4*d.*, and the amount of an alleged balance of a cash account delivered £276 5*s.* 4*d.*, making a total claimed of £1087 9*s.* 8*d.* Before the presentation of the petition for taxation the Petitioners' solicitors were informed by the company of the action. On the 13th of November, 1884, the company delivered a defence to the action, with a counterclaim against *J. S. Ward* for £2500. The balance of £276 5*s.* 4*d.* was arrived at on an account made out by *J. S. Ward*, which included a debit against the company of £1208 0*s.* 6*d.*, the alleged amount of costs

claimed by him against the company as "costs from the 9th of August, 1878 to the 31st of December, 1879." The action and counter-claim had not yet been tried.

The defence and counter-claim was made an exhibit to the affidavit.

By the defence the company denied the amount of the alleged bill of costs for £811 4*s.* 4*d.*, and said that a signed bill of costs was not delivered a month before action brought. They denied that the balance of £276 5*s.* 4*d.*, or any balance, was due from them. As to the alleged bill of costs for £1208 0*s.* 6*d.*, they said that no signed bill of such costs had been delivered. And, as to the Plaintiff's whole claim, the company pleaded that he, by the deed of the 5th of July, 1883, had absolutely assigned the same to *Alexander Ward* and *Stemp*, who before the action gave the company notice in writing of the assignment, and the company said that the Plaintiff was not suing for the benefit or with the consent of the assignees. By the counterclaim the company claimed from the Plaintiff £2500 for money had and received by him for the use of the company, or, in the alternative, £2500 damages for the Plaintiff's negligence as their solicitor in not obtaining the payment of £2500 on their behalf.

Hadley, for the company:—

The right of a solicitor to have his bill taxed rests entirely on the statute; before the statute he had no such right. Sect. 37 of the *Attorneys and Solicitors Act* of 1843 provides that, after the expiration of a month after the delivery of a bill of costs, if no application to tax the bill is made within the month by the person chargeable with the bill, it shall be lawful for a reference of the bill to taxation to be made, "on the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor." This does not give the right to apply for taxation to the assignee of a particular bill or particular bills of costs. The word "assignee," being used in conjunction with "executor and administrator," points to a general assignee of the property of the solicitor, such as an assignee in bankruptcy or insolvency, and not to the assignee of a particular bill of costs. The word "assign," not "assignee," would have been used to describe

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such an assignee, the word "assignee" having a well understood technical meaning, viz., an assignee in bankruptcy or insolvency. At the time when that Act was passed legal assignments of debts were unknown. At any rate, the order is wrong in form, because it does not contain an undertaking by the applicants to pay what shall be found due from *Ward* to the company.

The order is also bad because it was obtained by a suppression of material facts. Nothing was said about the action, and the Taxing Master would have no power to deal with the counter-claim.

[PEARSON, J.:—I propose to put these questions to the Taxing Master: *A.* employs *B.* as his solicitor. *B.* assigns his bill of costs to *C.*, and *C.* gives notice of the assignment to *A.* *C.* then obtains the common order to tax the bill against *A.* According to the practice in the Taxing Masters' office, must *C.* give an undertaking to pay what shall be found due from *B.* to *A.*? Would *B.* necessarily be served with notice of the taxation and be required, or be at liberty, to attend the taxation? *A.* alleges a counter-claim against *B.*; could this be raised on the taxation against *C.*? The hearing had better stand over until to-morrow, that I may have the Taxing Master's reply to my questions.]

Feb. 17. PEARSON, J.:—The Taxing Master asks whether the assignment of the costs gives power to the assignee to use the solicitor's name in any proceedings against the client.

Hadley:—It does not.

PEARSON, J.:—The Taxing Master says that he does not see how the common order to tax could be obtained by an assignee of costs, unless he had a right to use the solicitor's name in proceedings against the client. The Taxing Master says that no undertaking to pay would be required from the assignee, but the common order to tax requires that either party shall pay what shall be found due from him to the other upon the taxation. Undoubtedly the solicitor would be summoned, and the taxation would not proceed in his absence, unless he was contumacious, in which case he would not be allowed to re-tax the bill. The

Taxing Master says that the client could not on the taxation set up a claim for damages against the solicitor; he could only set up such items as would come into the cash account. The Taxing Master adds that neither he, nor any other of the Taxing Masters, has ever seen an order to tax a bill of costs made on the application of an assignee of the costs.

Hadley, for the company:—

If an order to tax can be made at all on the application of an assignee of the costs, the assignee ought to stand in exactly the same position as the assignor.

In the petition for the order no mention is made of the action brought by *Ward* against the company. This is a suppression of a material fact.

The order ought not to have been made to tax the bill delivered in June, 1884, alone: the prior bill for costs incurred in 1878 and 1879 ought also to have been included in the taxation. If less than one-sixth was taxed off the bill the client would have to pay the costs of the taxation, but that might not be so if both bills were taxed together.

[PEARSON, J.:—The client would not be entitled to have one bill taxed without the other: it would be very unjust if the solicitor's assignee could do this.]

S. Dickinson, for the Petitioners:—

The assignees are entitled under sect. 37 of the Act to apply for taxation.

The provision in the order that the Taxing Master may certify special circumstances prevents the possibility of injustice. The solicitor will be present at the taxation, and if it should appear that any injustice is likely to happen, the Taxing Master will make a special report. As the order now stands, it is open to the Court to direct that there shall not be an immediate payment of the amount found due. The order is right in form. The assignees are assignees only of the benefit of the bill of costs. The result of the taxation may be that they will get nothing, but they cannot be ordered to pay anything which may be due from *Ward* to the company. There has been no suppression of facts by them. They

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did not bring the action against the company; why should they be deprived of their rights on account of the assignor's improper conduct?

If the order is discharged, it ought not to be discharged with costs; there has been no breach of good faith by the Petitioners.

PEARSON, J.:—

The first objection raised to the order is, that the applicants are not "assignees" of the solicitor within the meaning of sect. 37 of the Act. I do not intend to decide that question. I am not prepared to say that the applicants are not "assignees," but it is unnecessary to decide the point, because there is another fatal objection to the order. There is another bill of costs, for business done by *Ward* for the company in 1878 and 1879, which has never been settled or taxed, and it is now a matter of dispute between him and the company. The applicants do not ask that this bill may be taxed. In my opinion an order to tax one only of several bills of costs ought not to be obtained as a common order. A person ought not to apply for taxation piecemeal, but he ought to ask to have all the outstanding bills of costs against the client taxed together, otherwise there would be a risk of doing the greatest injustice to the one side or the other. If it is possible for an assignee of costs to obtain an order for taxation, in my opinion he cannot obtain a taxation of one bill of costs only by means of the common order, even if only one of the bills has been assigned to him; he can only do so by means of a special application. The order to tax must be discharged with costs.

Solicitors for company: *Tyrrell Lewis & Co.*
Solicitors for Applicants: *Tamplin, Tayler & Joseph.*

W. L. C.

In re PAINE'S TRUSTS.

PEARSON, J.

1885

Feb. 21.

Appointment of New Trustees—Separate Trustees of distinct Part of Trust Property—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.

Appointment made of new trustees to act in conjunction with a sole continuing trustee of a will in relation to a distinct part of the trust property.

PETITION for appointment of new trustees.

The petition was entitled in the matter of the Trustee Acts, 1850 and 1852, and in the matter of the *Conveyancing Act*, 1882.

John Paine, by his will, dated the 5th of September, 1870, bequeathed to Sir *R. B. Harvey* and *G. P. Hill*, their executors, administrators, and assigns, the sum of £6000, upon trust to stand possessed thereof upon the trusts and with and subject to the powers and provisions thereinafter declared and contained concerning the moneys to arise from any sale or exchange of his *Patcham* estate under the powers thereinafter contained. And the testator devised his *Patcham* estate in strict settlement, giving certain powers to Sir *R. B. Harvey* and *Hill* as to the receipt and application of the rents of the property during the minority of any tenant for life or tenant in tail. And the will contained a power to Sir *R. B. Harvey* and *Hill*, and the survivor of them, and the executors or administrators of such survivor, with such consent as therein mentioned, to sell or exchange for other lands the *Patcham* estate, and the testator declared that the trustees or trustee for the time being should receive all moneys which might become payable upon any such sale or exchange and invest the same in the purchase of other lands to be settled to the same uses, and should meanwhile invest such moneys in their or his names or name as therein directed. By a codicil dated the 1st of July, 1873, the testator devised other lands to *George Harvey* for his life, and after his death the testator devised the same lands to Sir *R. B. Harvey* and *Hill* in fee, upon trust for sale or otherwise as therein mentioned. Neither the will nor the codicil contained a power of appointing new trustees. The testator died on the 2nd of June, 1874. *Hill* died before the testator. Part

PEARSON, J. 1885 *In re* PAINE'S TRUSTS.

of the *Patcham* estate was sold under the power of sale, and the proceeds of sale were invested in the purchase of £5536 19*s.* 10*d.* 2½ per cent. Annuities in the name of Sir *R. B. Harvey.* The £6000 legacy was invested in the purchase of £6367 18*s.* 3*d.* New 3 per cent. Annuities in the name of Sir *R. B. Harvey.* The petition was presented on behalf of the first tenant in tail of the *Patcham* estate, who was an infant, by his mother as his next friend, and it asked that two new trustees of the will might be appointed, so far as related to the *Patcham* estate and the legacy of £6000, in substitution for *Hill*, to act in conjunction with Sir *R. B. Harvey*, and that the two sums of stock might be respectively transferred by Sir *R. B. Harvey* into the joint names of himself and the two new trustees, upon the trusts of the will. The petition was served on Sir *R. B. Harvey.*

Freeman, for the petition:—

The note in *Hood & Challis* on the *Conveyancing Acts* (1) seems to suggest a doubt whether, under sect. 5 of the *Conveyancing Act*, 1882, an appointment of separate trustees for a distinct part of the trust property can be made unless the existing trustee first retires, because he is trustee of the whole.

C. Comyns Tucker, for the Respondent.

PEARSON, J.:—

I feel no difficulty in making the appointment asked for. If it could not be made, the same person could never be a trustee of two distinct parts of a trust estate.

Solicitors: *Senior, Attree, & Johnson*, agents for *Hunt, Currey, & Co., Lewes;* and for *FitzHugh, Woolley, & Baines, Brighton.*

(1) 2nd Ed. p. 237.

W. L. C.

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2. —— *Domicil—Priorities.*] In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors. *In re* KLŒBE. KANNREUTHER *v.* GEISELBRECHT 175

3. —— *Exoneration of General Personal Estate—Trust for Payment of Debts.*] The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies to a case where a charge for payment of debts after the grantor's death is created by deed. But no such rule applies to specific personal estate given on similar trusts; in such a case the specific personal estate will be the primary fund for the payment of the debts.—A testator by a deed executed in his lifetime conveyed and assigned real and personal estate to trustees, in trust for himself during his life, and after his death to sell and convert the property, and to stand possessed of the proceeds on trust, after payment of costs, to pay all the debts which should be due from him, and his funeral expenses, and, after such payment as aforesaid, upon trusts for his sons and their children. By his will the testator, after reciting the deed, devised and bequeathed all and every the residue of his real and personal estate not comprised in and subject to the trusts of the deed, to his wife for her life, with remainders over, and he appointed his wife and one of the trustees of the deed executors of his will, which was proved by the widow and one of the trustees:—*Held*, that, as regarded the real estate comprised in the deed, the testator's general personal estate was not exonerated from its primary liability to pay his debts.—But *held*, that the personal estate comprised in the deed was the primary fund for the payment of the debts.—*French* v. *Chichester* (2 Vern. 568; 3 Bro. P. C. 2nd Ed. p. 16) discussed and explained. TROTT *v.* BUCHANAN - - - - 446

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BUILDING SOCIETY—*Account—Order for Accounts not referring to Settled Accounts.*] Under an order directing an account, and not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so.—By the rules of a benefit society it was provided that the accounts should be audited, and that, after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. By statute 10 Geo. 4, c. 56, s. 33, it was directed that the accounts of a society of this description should be audited by two or more members of the society. In December, 1883, an order was made for an account of all moneys received by S., the late secretary. S. carried in audited accounts down to October, 1880, and claimed to have them treated as conclusive, while the Plaintiffs claimed to have them disregarded. The Court of Appeal decided (27 Ch. D. 111) that accounts audited and signed according to the rules were *primâ facie* evidence in favour of S., but that the Plaintiffs, in taking the accounts directed by the order, might impeach such audited accounts for fraud. On examination of the audited accounts, it appeared that they had throughout been audited and signed by one person only, who was not a member of the society. Bacon, V.C., made an order expressing his opinion that the accounts had been audited in accordance with the rules, and directing the account under the order of December, 1883, to commence from October, 1880, the date of the last audit:—*Held*, on appeal, that the accounts had not been duly audited in accordance with the statute and the rules, and that the order of the Vice-Chancellor must be discharged, but without prejudice to the right of the Defendant to shew that the accounts in question were to be treated as settled accounts on any other ground than that they were audited in accordance with the statute and the rules. Holgate *v.* Shutt - C. A. 111

2. —— *Mortgage Debt paid by Third Party and Deed, with Statutory Receipt indorsed thereon, handed to him—Intermediate Sale and Conveyance of Part of Mortgaged Property to Fourth Party—Effect of indorsed Receipt under s.* 42 *of Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42). Land and four houses thereon were vested in a building society as mortgagees, and on the society being paid off by the Plaintiff, by request of the mortgagor, the mortgage deed, with a receipt indorsed in accordance with the 42nd section of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), was with other title-deeds handed to him, and the mortgagor shortly afterwards conveyed to him the property, on mortgage for a larger loan. The mortgagor had prior to the payment to the building society conveyed one house in fee to the Defendant, who was ignorant of the mortgage to the society, and he at once took possession of it, but the Plaintiff knew nothing of the sale and purchase:—*Held*, that in accordance with pre-

BUILDING SOCIETY—*continued.*

vious decisions, though not agreeing with them, the effect of the indorsed receipt was to vest the legal estate in the Plaintiff, and to give him, to the extent of the money paid to the society and the interest thereon, priority over Defendant's claim.—*Pease* v. *Jackson* (Law Rep. 3 Ch. 576), *Fourth City Mutual Benefit Building Society* v. *Williams* and *Marson* v. *Cox* (14 Ch. D. 140. 147), and *Robinson* v. *Trevor* (12 Q. B. D. 423), discussed. SANGSTER *v.* COCHRANE - - 298

3. —— *Mortgage — Reconveyance — Indorsed Receipt—Priority—37 & 38 Vict. c. 42, s. 42.*] A piece of land was mortgaged to a friendly society, and by way of second mortgage to a banking company. A building society agreed to pay off the first mortgage, and to make a further advance, having no notice of the second mortgage. Accordingly by a deed indorsed on the first mortgage deed, the first mortgagees reconveyed to the mortgagor; and by another deed he conveyed the land to the building society to secure the repayment of the sum paid to the first mortgagees, and the further advance:—*Held*, that as the legal estate had passed by a reconveyance and not by a receipt under 37 & 38 Vict. c. 42, s. 42, it was vested in the building society, and gave them priority over the second mortgagees.—*Robinson* v. *Trevor* (12 Q. B. D. 423) distinguished. CARLISLE BANKING COMPANY *v.* THOMPSON - - - 398

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—— *Wootten's Estate, In re* (Law Rep. 1 Eq. 89) approved - - - - **628**
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CHARITY—*Action for Account — Parties — Representative Plaintiff — Attorney-General — Fund raised by Voluntary Subscriptions—Action by some Members of Committee on behalf of all against former Member—Certificate of Charity Commissioners—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 17, 62.] An action was brought by five of the members of a church building committee, on behalf of themselves and the other members of the committee, against a former member, claiming an account of all moneys received and paid by him in respect of the Church Building Fund during the period of his membership. The fund was raised by voluntary subscriptions; seventeen persons having constituted themselves into a committee to receive subscriptions for the purpose of improving the church of the parish, and to apply the moneys thus collected:—*Held*, that, the members of the committee being mere agents of the subscribers, the action could not be maintained by some of the agents against others.—But *held*, also, that, even if all the subscribers were suing, the action could not be maintained in the absence of the Attorney-General.—Whether the action could be maintained without the certificate of the Charity Commissioners, *quære*. Strickland *v.* Weldon - - - **426**

2. —— *Gift to Charity—Will—Construction—"Charitable and deserving objects"—"Money."*] A testatrix by her will desired "that the whole of the money over which I have a disposing power be given in charitable and deserving objects, the amount being six hundred pounds sterling":—*Held*, that this was a good charitable gift.—*Williams* v. *Kershaw* (5 Cl. & F. 111, n.) distinguished.—At the date of the will in August, 1881, the testatrix had over £600 at her bankers. In February, 1883, she invested £600 in the purchase of £586 Consols. At the date of her death in May, 1884, she had the £586 Consols, £555 at her bankers, and £8 cash in her house:—*Held*, that the word "money" in the will ought not to be extended beyond its strict meaning. *In re* Sutton. Stone *v.* Attorney-General - - **464**

3. —— *Mortmain—Devise—Charitable Uses—Secret Trust—Church—Mortmain Act*, 9 *Geo.* 2, *c.* 36—*Church Building Act*, 43 *Geo.* 3, *c.* 108—*Site with existing Church — Practice — Demurrer—"Point of Law"—Dismissal of Action—Rules of Supreme Court*, 1883, *Order* xxv., *rr.* 1, 2, 3.] A testator, by his will executed three months before his death, devised all his real estate, which included a piece of land of about one acre, with an unconsecrated building thereon licensed by the bishop for public worship, to his wife absolutely. The devise was in pursuance of a secret agreement between the testator and his wife, whereby the latter undertook to hold the land and building upon trust, after her husband's death, to convey the same as and for a parish or district church in perpetuity:—*Held*, that the devise was legal under the statute 43 Geo. 3, c. 108, and was not rendered illegal by any provisions of the Mortmain Act, 9 Geo. 2, c. 36.—An action having been by the consent of the parties set down for hearing under Rules of Supreme Court, 1883, Order xxv., r. 2, upon a "point of law" raised by the defence, and the point having been decided in favour of the Defendant, the judge, as the decision substantially disposed of the whole action, dismissed the action under r. 3, and with costs, by analogy to the former practice on demurrer. O'Brien *v.* Tyssen [**372**

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COMMISSIONERS OF SEWERS—*Power to take Land—57 Geo. 3, c. xxix.—Right of Pre-emption—14 & 15 Vict. c. xci. s.* 54] Two houses adjoining Wood Street, in the city of London, having been destroyed by fire, the outer walls only being left standing, the Commissioners of Sewers adjudicated that it was desirable to widen Wood Street, and that the two houses, and the and on which they stood, projected into and pre-

COMMISSIONERS OF SEWERS—*continued.*

vented them from widening the street, and that the possession and purchase of those houses was necessary for that purpose, and they directed their solicitor to treat for the purchase. Notice to treat was accordingly given for the whole of the houses. The owners brought their action for an injunction to restrain the Commissioners from proceeding on this notice. It was admitted by the Commissioners that they only meant to use a strip of 5½ feet in breadth for widening the street, and intended to sell the rest without giving the Plaintiffs any option of pre-emption:—*Held*, by Kay, J., and by the Court of Appeal, that the Plaintiffs were entitled to an injunction, for that the adjudication was *ultrà vires*, the Commissioners having no power to adjudicate that the possession of the whole of a piece of land is necessary for the purpose of improvements when they only intend to use a small part of it for that purpose, though if they made such an adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned.—If part of a piece of land prevents an improvement, the Commissioners have power to take part compulsorily, their power of proceeding compulsorily not being limited to taking the whole.—Whether the Commissioners, if they only want a part of the site of an existing house for the purpose of an improvement, can adjudicate that the possession and purchase of the whole house are necessary *quære*.—*Thomas* v. *Daw* (Law Rep. 2 Ch. 1), considered.—By Kay, J., *semble*, that the right of pre-emption given by 57 Geo. 3, c. xxix., s. 96, is not taken away by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), s. 54. Gard *v.* Commissioners of Sewers of the City of London - - - - - - 486

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COMPANY—*Action by Debenture-holders — Administration of Assets—Insufficient Estate—Costs—Priority—Receiver and Manager — Trustees—Practice—Costs—Set-off—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-s.* 21.] In a suit instituted by a debenture-holder of a company, on behalf of himself and the other debenture-holders, against the company and the trustees of a deed, by which leasehold collieries and plant of the company were assigned to trustees to secure the payment of the debentures, to enforce the security, a receiver and manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, the Plaintiff having the conduct of the sale, and the purchase-money was paid into Court. The fund was insufficient. The original Plaintiff became bankrupt in the course of the proceedings, and another debenture-holder was substituted for him as Plaintiff. On the further consideration of the suit:—*Held*, that the costs and other expenses must be paid out of the fund in the following order:—(1.) The Plaintiff's costs of the realization of the property, including the costs of an abortive attempt to sell. (2.) The balance due to the receiver and manager (including his remuneration) and his costs of the suit. (3.) The

COMPANY—*continued.*

costs, charges, and expenses of the trustees of the deed. (4.) The two Plaintiffs' costs of the suit, *pari passu*.—When the second Plaintiff was substituted for the first, an order was made that the solicitors of the first Plaintiff should, without prejudice to their lien (if any) deliver up to the solicitor of the second Plaintiff all documents in their possession relating to the conduct and prosecution of the suit:—*Held*, that the solicitors of the first Plaintiff had no lien on the documents which could entitle them to priority in respect of their costs.—Two summonses taken out by the Plaintiff were heard with the further consideration of the suit, and were dismissed with costs.—*Held*, that these costs must be set off against the costs which the Plaintiff was entitled to receive out of the fund. Batten *v.* Wedgwood Coal and Iron Company - - - - 317

2. —— *Memorandum of Association, Provisions of — Preference and Ordinary Shares—Subsequent Special Resolutions acted upon for ten years, altering the Appropriation of Revenue, invalid—Rights of Shareholders under original Contract.*] The memorandum of association of a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), stated that a portion of the shares were to have a right of receiving a dividend by preference to the other shares, and that the preference shares should have a right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and to one-fifth of the remainder of the net revenue, after a deduction of a sum sufficient for paying 7 per cent. per annum on the ordinary shares; and also that those shares should have a right to the rest of the dividend whatever it might be, up to 7 per cent. after payment of 7 per cent. to the preference shares, and to four-fifths of the remainder of the net revenue, after deduction of a sum sufficient to pay the dividends to the preference and ordinary shares.—The directors applied the profits of the company in substantial accordance with the provisions in the articles of association till November, 1872, when the company passed special resolutions which altered the priorities and payments of the net revenue as between the preference and ordinary shareholders, and which provided for the redemption of shares out of the surplus profits, and they were acted upon till July, 1883, when the company passed a special resolution by which the original appropriation of the revenue as provided by the memorandum of association, was restored:—*Held*, that the resolutions of 1872 were not valid; that no resolution of the company, special or otherwise, could alter the contract made between the company and all the shareholders, and that the revenue of the company available for dividend must be applied in the manner originally prescribed by the memorandum of association.—*Held*, also, that the receipt of dividends on the footing of the resolutions of 1872, might prevent any shareholder who had received them from asserting a claim against the company for any larger payment during the period of such receipts, but that could not amount to the ratification of an implied contract that the dividends on those shares should always be paid on the same footing. Ashbury *v.* Watson 56

COMPANY—*continued.*

3. —— *Transfer of Shares—Shareholder indebted to Company—Liquidation of Shareholder—Refusal of Company to register—Trustee.*] By the articles of association of a company it was provided that the directors might refuse to register a transfer of shares while the shareholder making the same was indebted to the company, or if they should consider the transferee an irresponsible person. It was also provided that persons becoming entitled to shares in consequence of the death, insolvency, or bankruptcy of a shareholder might be registered on the production of such evidence as might from time to time be required by the directors, and that any transfer or pretended transfer of shares not being approved by the directors should be absolutely void.—A holder of shares in the company executed transfers of such shares to the nominees of a bank as a security for advances. The company refused to register these transfers, on the ground that the transferor was indebted to the company. Subsequently, the transferor having filed a liquidation petition, a trustee in liquidation was duly appointed. Such trustee, with the consent of the bank and their nominees, applied to the directors of the company to be registered as the owner of the shares, but they refused the application. The bank, though consenting to the trustee's registration, had never waived their security:—*Held* (by the Earl of Selborne, L.C., Brett, M.R., and Cotton, L.J.), that the declining to register the transfers by the directors was not a disapproval of them so as to render them void within the meaning of the articles, that the trustee was not entitled to the shares within the meaning of the articles so long as the transfers remained in force, and that the trustee was not entitled to be registered, notwithstanding the consent of the transferees. *Ex parte* Harrison. *In re* Cannock and Rugeley Colliery Company - - - - - **C. A. 363**

4. —— *Winding-up Petition—Advertisements — Withdrawal — Contributories — Costs — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 82—*Rules of November*, 1862, *r.* 2.] A winding-up petition had appeared in the Court paper from time to time which had never been advertised:—*Held*, that the petition could be withdrawn without payment of the costs of a shareholder appearing to oppose. *In re* United Stock Exchange, Limited. *Ex parte* Philp & Kidd - **183**

5. —— *Winding-up — Petition — Creditor's Petition—Dismissal of Petition on Application of Petitioner — Costs — Shareholders and Creditors appearing to consent.*] Where a winding-up petition is dismissed on the application of the petitioner, shareholders and creditors appearing either to oppose or support the petition are entitled to their costs.—*In re Jablochkoff Electric Light and Power Company* (Weekly Notes, 1883, p. 189) distinguished. *In re* Nacupai Gold Mining Company - - - - **65**

6. —— *Winding-up—Proof—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 84, 153—*Notice.*] In consideration of moneys paid in at a distant foreign branch of a banking company whose head office was in London, drafts on the head office were given after presentation of a petition to wind

COMPANY—*continued.*

up the company, and appointment of a provisional liquidator in England, but before (from want of direct telegraphic communication) any notice of the stoppage of the bank in London had been received at the foreign branch, and before the date of the winding-up order:—*Held*, that the contract which was entered into by the officers of the foreign branch on behalf of the company without any notice of the winding-up proceedings, and therefore before revocation of their authority, was not invalidated by the Companies Act, 1862, s. 153; and accordingly that the creditors in respect of such transaction were not entitled to have their money refunded as on the footing of a void transaction, but merely to prove for the amount under the winding-up *pari passu* with the other creditors.—As between the holders for value of the drafts and the persons by whom the consideration was paid, the holders were held entitled to prove. *In re* Oriental Bank Corporation. *Ex parte* Guillemin - - **634**

7. —— *Winding-up—Rates—Business carried on by the Liquidator — Beneficial Occupation.*] An hotel company was wound up under an order of the Court, and the liquidator was directed to sell the hotel, but with liberty to carry on the business till the sale, so as to sell it as a going concern. The liquidator accordingly carried on the business in the hotel, but made no profit by it. Shortly after the commencement of the winding-up a poor-rate was made, and the overseers claimed payment of the rate from the liquidator in respect of his occupation of the hotel:—*Held* (affirming the decree of the Vice-Chancellor of the county palatine of Lancaster) that the rate must be paid in full.—*In re West Hartlepool Iron Company* (34 L. T. (N.S.) 568), and *In re Watson, Kipling, & Co.* (23 Ch. D. 500), distinguished. *In re* International Marine Hydropathic Company - - - - **C. A. 470**

8. —— *Winding-up — Rates — Business Premises, Occupation of, by Liquidator—Beneficial Occupation.*] A company was being wound up under supervision, the liquidation commencing in 1882. The liquidator did not keep the concern in full work, but remained in occupation of the business premises for the purpose of carrying out some pending contracts, finishing a quantity of unfinished articles, and storing and keeping in order a quantity of completed articles with a view to selling them. In March, 1883, a rating authority made a rate for 1883 on all the property within the district. The liquidator allowed the time for appealing against the assessment to go by. The rating authority applied to the Court for payment of the rate in full:—*Held*, that as the liquidator had from the commencement of the winding-up occupied the property for the purposes of the company, and with a view to acquiring gain or avoiding loss to the company, the rate ought to be paid in full.—Whether, in order to entitle the rating authority to be paid in full, it is necessary for the liquidator to have any more beneficial occupation of the property than is required under the ordinary law as to rating, *quære*. The test in *In re West Hartlepool Iron Company* (34 L. T. (N.S.) 568) doubted.—Where the liquidator, being in possession, does not appeal against

COMPANY—*continued.*
the assessment, the Court will not refuse to order payment of the rate in full on the ground of its being too high, except perhaps in extreme cases. *In re* National Arms and Ammunition Company [C. A. 474

9. —— *Winding-up — Reconstruction — Right of dissentient Member to inspect before going into Arbitration—Companies Act*, 1862, *ss.* 161, 162.] A banking company being in the course of voluntary winding-up for the purpose of reconstruction, one of the members having been, with the others, offered 5*s.* in the pound for her holding in the old company, gave notice to arbitrate under the 161st section, as a dissentient. She then claimed the right to examine the books of the company in order to see whether it would be better for her to accept the offer of 5*s.* or go on with the arbitration.—Application refused, with costs of adjournment into Court. *In re* Glamorganshire Banking Company. Morgan's Case - - - 620

10. —— *Winding-up—Withdrawal of Members—Mutual Loan Society—Payment out of Special Fund — Applicability of Rules to Winding-up.*] The rules of an unlimited mutual loan society provided that a separate fund should be formed by the subscriptions of members joining in each year, which subscriptions might, with the consent of the directors, be paid in advance. The accounts of each fund were to be kept distinct, and the members were to receive advances called "appropriations," out of the accumulations of the particular fund to which they subscribed. The appropriations were to be repaid by instalments extending over twenty years. Members might withdraw on giving notice, and were in that case entitled to a return of their subscriptions, together with payment of the bonuses declared in respect of their shares, such payments to be made in the order of the dates of their notices, and only out of moneys received after the date of their notices in repayment of appropriations.—When appropriations had been made to all members of a fund, or before that under certain circumstances, the fund was to be declared closed and the accumulations were to be divided among the continuing members of the fund.—The company was wound up voluntarily, and the liquidator applied for the direction of the Court as to the distribution of the assets among the members, there being no outside creditors.—There were four classes of members whose interests were in dispute:—1. Members who had given notice of withdrawal before the closing of their funds, and before the commencement of the winding-up.—2. Members who had given notice of withdrawal after the closing of their funds, but before the commencement of the winding-up.—3. Continuing members who had paid subscriptions in advance.—4. Continuing members who had not paid any subscriptions in advance.—*Held*, by Kay, J., that the provision for the repayment of withdrawing members out of the particular fund ceased to apply on the winding-up of the company, and that those members who had given notice of withdrawal before the commencement of the winding-up had no priority over the continuing members:—*Held*, also, that the continuing members who had paid their subscriptions in advance had no priority over the

COMPANY—*continued.*
other members:—But, *held*, by the Court of Appeal, that, according to the true construction of the articles, members who had given notice of withdrawal before the closing of their fund and before the commencement of the winding-up had a charge on the repayments of appropriations belonging to their particular funds; that such charge did not cease on the closing of the fund or on the winding-up, and that they were therefore entitled to be paid in full out of such repayments in priority to all other members.—*In re Blackburn and District Benefit Building Society* (24 Ch. D. 421; 10 App. Cas. 33) followed.—*In re Mutual Society* (24 Ch. D. 428, n.) distinguished. *In re* Alliance Society - - - C. A. 559

—— Bill of sale by - - - - 682
See Bill of Sale.

—— Winding-up—Crown debts - - 643
See Crown.

COMPENSATION—Sale of land—Misrepresentation - - - - - 309
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COMPULSORY POWERS — Commissioners of Sewers. - - - - 486
See Commissioners of Sewers.

CONDITION—Determination of estate on bankruptcy - - - - 523
See Will. 2.

CONDITIONS OF SALE - 309, 586, 661, 712
See Vendor and Purchaser. 1, 2, 3, 8.

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CONTEXT—Reference to—Misdescription 153
See Will. 3.

CONTINGENT LEGACY—Intermediate income
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CONTINUANCE OF ACTION—Trustee in bankruptcy—Adoption of previous proceedings - - - - - 53
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—— Trustee in bankruptcy — Suing in official name - - - - - 38
See Practice. 12.

CONTRACT—Sale of land—Rescission - 309
See Vendor and Purchaser. 2.

CONTRIBUTORY—Costs—Winding-up petition
See Company. 4. [183

CONVEYANCE—Objection to—Right to rescind
See Vendor and Purchaser. 3. [712

COPYRIGHT—*Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 47—*New or Original Design.*] A design is not a proper subject of registration under the Patents, Designs, and Trade-marks Act, 1883, unless there is a clearly marked and defined difference involving substantial novelty between it and any design previously in use.—A design for a shirt collar was registered, the advantages claimed for which were —the height of the collar above the stud which fastened it in front, the cutting away of the corners in a segment of a circle, and the absence of a band. A collar was shewn to have been previously in use which had no band, and in which the corners were cut away in arcs of circles; but the cutting

COPYRIGHT—*continued.*
away was not so wide, and the height above the stud was not so great, as in the registered design:—*Held*, that the registered design was not new or original within the meaning of the Act, and must be removed from the register. Le May *v.* Welch. *In re* Le May's Registered Design [C. A. 24

COSTS—Actions by debenture-holder - 317
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—— Administration action - - 159
See Administration. 1.
—— Appeal for - - - - 549
See Practice. 2.
—— Lands Clauses Act - - - 237
See Lands Clauses Act. 1.
—— Security for - - - 232, 482
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—— Trustee in bankruptcy - - 53
See Practice. 5.
—— Vendor and purchaser—Making out title
See Vendor and Purchaser. 7. [84
—— Winding-up petition - - 65, 183
See Company. 4, 5.

COUNTER-CLAIM—Third party - - 333
See Practice. 14.

COURT OF APPEAL—Jurisdiction of—Misconduct of solicitor - - - 614
See Solicitor. 4.

COVENANT — *Mutual Restrictive Covenants — Building Estate—Alteration of Character of Estate —Acquiescence—Lord Cairns' Act* (21 & 22 *Vict. c.* 27)]. A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant and for damages. The Plaintiff had known for three years before the action was commenced that the Defendant was using his house as a beershop, and had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, and that some of the houses near the Plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents:—*Held*, that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the Plaintiff, as the change was not caused by his conduct; but that the Plaintiff had lost the right to enforce his covenant either by injunction or damages, through his acquiescence in the proceedings of the Defendant.—*Duke of Bedford* v. *Trustees of the British Museum* (2 My. & K. 552) explained.—Lord Cairns' Act (21 & 22 Vict. 27) is applicable to cases where the damage sustained by the Plaintiff is only nominal, as well as to cases where he is entitled to substantial damages.—The repeal of Lord Cairns' Act by 46 & 47 Vict. c. 49 has not affected the jurisdic-

COVENANT—*continued.*
tion of the Court.—*Per* Fry, L.J.: An amount of acquiescence on the part of the Plaintiff which would not be sufficient to bar his action, may be sufficient to induce the Court to give damages instead of an injunction. Sayers *v.* Collyer [C. A. 103
—— Mortgagor—Judgment in foreclosure action
See Mortgage. 2. [181
—— To settle—Female infant - - 124
See Election.

CREDITOR'S PETITION—Dismissal—Costs 65
See Company. 5.

CROWN—*Prerogative—Companies Act*, 1862 (25 & 26 *Vict. c.* 89)—*Judicature Act*, 1875, *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 30, 40, 150.] The provisions of the Bankruptcy Act, 1883, which take away the priority of the Crown over other creditors in the distribution of assets in bankruptcy, have not, by virtue of the assimilating provisions contained in the Judicature Act, 1875, s. 10, been incorporated into the Companies Act, 1862, so as to bar the prerogative right of the Crown to issue process and thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a company in course of liquidation under the Companies Act. *In re* Oriental Bank Corporation. *Ex parte* The Crown - - - - - - 643

DAMAGES—Lord Cairns' Act - - 103
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—— Specific performance—Alternative relief
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DEEDS—Not in vendor's possession—Costs 84
See Vendor and Purchaser. 7.

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See Charity. 3.

DEPOSIT—Parliamentary—Railway company
See Railway Company. 1. [652

DEPRECIATORY—Conditions - - 586
See Vendor and Purchaser. 1.

DESCENT—*Inheritance—Ex parte Paternâ or Ex parte Maternâ—Inheritance Act* (3 & 4 *Will.* 4, *c.* 106), *s.* 2.] A testator who died in 1853 devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to the testator's only son and to his two daughters in equal shares, and to the survivors or survivor of them, with remainder on trust for the children of the son and the daughters respectively in fee, with an ultimate remainder unto and to the use of the testator's own right heirs. The son and both the daughters survived the testator, but they all died without issue. The son survived the daughters, and died intestate. He was the heir-at-law of his father, and also of his mother. The testator had also devised real estate of his own to the son, who elected to confirm the will:—*Held*, that the equitable estate, which the son took under the will and by virtue of his election, merged in the legal estate which descended to

DESCENT—*continued.*
him from his mother, and that the descent was regulated by the legal estate, and that, consequently, on his death intestate and without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, and not to his own heir. *In re* Douglas. Wood *v.* Douglas - - 327

DESIGNS—Registration of copyright - 24
See Copyright.

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See Patent. 1.

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See Practice. 8.

—— Inspection of books of company—Arbitration - - - - - 620
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DISENTAILING DEED—Existing power of sale
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DIVISIBLE GIFT—Remoteness - - 436
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See Bill of Sale.

DOMICIL—Foreign — Administration — English assets—Foreign creditors - 175
See Administration. 2.

DRAINAGE—Cost of—Ordinary outgoings 431
See Will. 4.

EDUCATION—Infant - - - - 82
See Infant. 1.

ELECTION — *Married Woman — Settlement on Marriage of Female Infant—Life Interest for Separate Use—Restraint on Anticipation—Covenant by her to settle after-acquired Property—Bequest to her after Twenty-one during Coverture for her Separate Use—Voidable Covenant—Approbation and Reprobation—Sequestration of Life Interest.*] The doctrine of election is founded upon the rule that a person cannot take under and against the same instrument, and the equity is not that the person electing to take against the instrument shall be required to assign, but that he shall not be permitted to take, the benefit given to him thereunder.—Accordingly the Court is not prevented from enforcing this rule by the incapacity of the person so electing to alienate the interest taken under the settlement. And upon this principle the Court can, notwithstanding a restraint on anticipation attaching thereto, sequester the life interest of a married woman electing to take against a settlement until compensation has been made thereout to the persons disappointed under the settlement by such election.—Upon the marriage of a female infant in 1860 personalty was settled by her father upon trusts under which she took the first life interest for her separate use without power of anticipation, and the settlement contained a covenant by her to settle all her after-acquired property upon trusts under which the husband took the first life interest. In 1883 and during the coverture personal property was bequeathed to her for her separate use, and she chose to avoid her covenant and to take this property instead of bringing it into the settlement. She also contended that she was entitled to keep the life interest under the settlement which she was

ELECTION—*continued.*
restrained from anticipating without making compensation thereout to the persons disappointed under the settlement, upon the ground that as she was restrained from alienating such life interest the Court could not impound it:—*Held*, that as the married woman had elected to defeat one of the provisions of the settlement, she was not competent to take a life interest under another of them, and that, notwithstanding the restraint on anticipation, the income which would have been payable to her if she had not so elected, ought to be applied in making compensation to the persons disappointed by her election for the benefits of which they had been thereby deprived, and that the trustees of the settlement must retain and apply the same accordingly.—*Smith* v. *Lucas* (18 Ch. D. 531) and *In re Wheatley* (27 Ch. D 606) dissented from. *In re* Vardon's Trusts 124

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See Practice. 7.

—— Discovery of fresh—*Res judicata* - 516
See National Debt Commissioners.

—— Of title—Surveyor's certificate - 661
See Vendor and Purchaser. 8.

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EXAMINATION—Married woman—Settled Estates Act - - - - - 171
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See Power.

—— Misrepresentation—Sale of land 7, 309
See Vendor and Purchaser. 2, 4.

FRAUDS, STATUTE OF—Contract for sale 305
See Vendor and Purchaser. 5.

HUSBAND AND WIFE—*Joint Investments—Survivorship—Separate Estate.*] Banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—*Held*, that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *In re* Young. Trye *v.* Sullivan - - - 705

HUSBAND AND WIFE—*continued.*

2. —— *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 23—*Will—Wills Act* (1 *Vict. c.* 26), *s.* 24—*After-acquired Property.*] Sect. 1, sub-sect. 1, of the Married Women's Property Act, 1882, gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. —Consequently, notwithstanding sect. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end. *In re* Price. Stafford *v.* Stafford - 709

3. —— *Separation Deed—Ward of Court—Custody of Children—Access.*] By a deed of separation made in 1880 between H., a medical officer in the army, and his wife, provision was made as to the custody of their four children (of whom the eldest was eleven and the youngest three years of age) during the approaching absence of the husband in India, after which he was to resume the entire custody of them, but he covenanted that full and free liberty of access to them should be always accorded to the wife, to the extent at least of her having the opportunity of spending one day in every fortnight with them. In 1884 he was ordered to Egypt and proposed to take the first and third of the children with him. Mrs. H. applied for an injunction to restrain him from doing so:—*Held*, by Pearson, J., that H. was bound by the covenant to keep the children in such a place that Mrs. H. could have free access to them, and that an injunction ought to be granted: —*Held*, by the Court of Appeal, that the covenant did not bind H. to keep the children in a place where Mrs. H. could conveniently have access to them, and did not preclude him from taking them with him to any place where he might be ordered in the course of his duties and that the injunction must be dissolved, there being no case made that he was removing them for the purpose of preventing Mrs. H. from having access to them. Hunt *v.* Hunt - - C. A. 606

—— Election by wife—Female infant - 124
See Election.

—— Separate examination of wife - - 171
See Settled Estates Act.

INCOME—Intermediate—Maintenance of infant—Contingent legacy - - 291
See Infant. 2.

—— Purchase-money—Settled Land Act - 628
See Settled Land Act. 2.

INCONGRUITY—Mistake in description - 153
See Will. 3.

INDEMNITY—Right to—Trustee and *cestui que trust*—Married woman - - 595
See Trustee. 1.

INDORSEMENT—Dock warrant - - 682
See Bill of Sale.

—— Receipt—Mortgage to building society 398
See Building Society. 3.

INFANT—*Education—Jurisdiction.*] Infants interested in real estate in England, whose father was dead, were living in charge of their mother, who was resident out of the jurisdiction, and was

INFANT—*continued.*

one of their testamentary guardians. At the instance of their other two guardians an order was made declaring in what faith they ought to be educated. *In re* Montagu. *In re* Wroughton. Montagu *v.* Festing - - - - 82

2. —— *Interim Income — Will — Legacies payable contingently on Legatees attaining the age of Twenty-one—Gift of Residue—Sum not actually set apart by Executors—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] Sect. 43 of the Conveyancing and Law of Property Act, 1881, applies only to cases where, apart from that section, the intermediate income would belong to the infant on the gift of the *corpus* becoming absolute.—The cases of *In re Cotton* (1 Ch. D. 232) and *In re George* (5 Ch. D. 837) discussed. *In re* Dickson. Hill *v.* Grant [291

3. —— *Ward of Court—Leave to take Ward of Court out of the Jurisdiction.*] A resident in Jamaica died leaving two children, who were born there, and resided there with their mother till 1875, when the elder, a daughter, was sent to England to be educated. The mother came to England in 1876 to place her son at school, and returned to Jamaica in 1878. In 1880 she came to England to see her children and had remained there, the daughter, upon leaving school, living with her. With the above exceptions the mother had always lived in Jamaica, and regarded it as her home. She now wished to return thither permanently, and to take with her the daughter aged twenty years and three months, the son, who was apprenticed to an engineer, remaining in England. The children were wards of Court, and the mother had been appointed by the Court sole guardian:—*Held*, by Kay, J., that the Court would not allow a ward of Court to be taken out of the jurisdiction except under very special circumstances, and that there were not in the present case any such special circumstances as would justify giving the permission:—*Held*, on appeal, that leave may be given to take a ward out of the jurisdiction without a case of necessity being shewn, the Court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed. Leave was accordingly given upon a relative resident in England being appointed guardian along with the mother. *In re* Callaghan. Elliott *v.* Lambert - C. A. 186

—— Custody—Covenant in separation deed 606
See Husband and Wife. 3.

—— Joint tenant—Severance - - 416
See Joint Tenant.

—— Married female—Election - - 124
See Election.

—— Order for administration - - 457
See Practice. 4.

INFRINGEMENT — Patent — Advertisement warning against - - - 394
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INHERITANCE—Descent *ex parte paternâ* or *ex parte maternâ* - - - 327
See Descent.

INJUNCTION—Advertisement warning against infringement of patent - - 394
See PATENT. 2.
—— Pollution of stream - - - 688
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—— Waterworks company - - - 138
See WATERWORKS COMPANY.
INSOLVENCY—Security for costs—Trustee in bankruptcy - - - - 38
See PRACTICE. 12.
INSPECTION—Books of company—Arbitration
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INVESTMENT—Insufficient—Liability of trustee
See TRUSTEE. 2. [268
—— Investment in joint names—Husband and wife - - - - - 705
See HUSBAND AND WIFE. 1.

JOINT TENANT—*Infant—Severance.*] A marriage settlement contained a proviso for the settlement of the present and after-acquired property of the intended wife, who was an infant. She was then entitled in remainder jointly with two others to a share in Bank annuities standing in the names of trustees:—*Held*, that the joint tenancy was severed. BURNABY *v.* EQUITABLE REVERSIONARY INTEREST SOCIETY - - 416
JUNCTION—Siding on railway—Rights of landowner - - - - 190
See RAILWAY COMPANY. 2.
JURISDICTION—Court of Appeal—Solicitor 614
See SOLICITOR. 4.
—— Mother resident out of - - - 82
See INFANT. 1.
—— Plaintiff out of—Security for costs - 232
See PRACTICE. 11.
—— Ward of Court - - - - 186
See INFANT. 3.
—— Waterworks company—Settlement of disputes - - - - 138
See WATERWORKS COMPANY.

LAND—Power to take - - - 486
See COMMISSIONERS OF SEWERS
—— Property of lunatic—Sale - - 514
See LUNATIC.
LANDOWNER—Right to use of siding on railway—Renewing junction - - 190
See RAILWAY COMPANY. 2.
LANDS CLAUSES ACT (8 & 9 *Vict. c.* 18), *ss.* 80, 85—*Entry on Land—Abandonment of Railway—Costs of "Taking Land."*] A railway company gave notice to treat for a piece of land, and no agreement having been come to with the owners, they entered on the land under the powers of the 85th section of the Lands Clauses Act, and paid the deposit into Court. Afterwards the company obtained an Act by which they were empowered to abandon that part of their undertaking, but it was enacted that the abandonment should not prejudice any landowner's rights to compensation for damage done by entry and occupation, and that the compensation should be determined in the manner provided by the Lands Clauses Act.

LANDS CLAUSES ACT—*continued.*
The owners of the land then entered into an agreement with the company fixing the amount of compensation at £1350, but providing that this should not include costs, charges and expenses which the owners might be entitled to recover under the company's Acts, but that such costs, charges, and expenses should be recoverable from the company in addition to the compensation as if the agreement had not been entered into. The company objected to pay the costs of ascertaining the amount of the compensation on the ground that the land had not been taken within the meaning of the 80th section of the Lands Clauses Act. They also objected to pay the costs of the preparation of the agreement:—*Held* (affirming the decision of Kay, J.), that the land had been "taken" within the meaning of the 80th section, and that the company must pay the costs of ascertaining the amount of compensation and of the preparation of the agreement. CHARLTON *v.* ROLLESTON - - - - C. A. 237

2. —— *Payment out of Purchase-money—Person "becoming absolutely entitled"—Trustees with Power of Sale—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69]. A share of stock in Court, which represented money paid into Court by a railway company for the purchase of land taken under their statutory powers, had been assigned by the beneficial owner to trustees, on trust for sale and conversion, at the request in writing of herself during her life and afterwards at the discretion of the trustees, and to hold the proceeds on certain trusts:—*Held*, that, the settlor joining in the petition, and the company not objecting, the share might be transferred to the trustees as persons "becoming absolutely entitled" within the meaning of sect. 69 of the Lands Clauses Consolidation Act, 1845. *In re* WARD'S ESTATES [100

LARCH TREES—Windfalls - - 89, 220
See SETTLEMENT. 3, 4.
LEASE—Mistake—Rectification - - 255
See MISTAKE.
LEASEHOLD—Devise of real estate - 66
See WILL. 5.
LEGACY—Ademption - - - 552
See WILL. 1.
LIFE ESTATE—Determination of, on bankruptcy—Children born afterwards - 523
See WILL. 2.
LIMITED OWNER—Settled Land Act - 378
See SETTLED LAND ACT. 1.
LIQUIDATOR—Business carried on by—Rates
See COMPANY. 7, 8. [470, 474
LOCAL GOVERNMENT ACTS—*Sewer—Local Authority, vesting in—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13—*Obstruction by Owner of Soil—Injunction*]. A sewer made by the owner of some only of the houses in a street not yet a highway, though made for the purpose of draining his own amongst other houses, is not a sewer made by a person "for his own profit" within the meaning of the exception in sect. 13 of the Public Health Act, 1875.—The word "sewer" in that Act should receive the largest possible interpretation, and a drain is a "sewer" within the

LOCAL GOVERNMENT ACTS—*continued.*
meaning of sect. 13 when more than one house has been connected with it. Acton Local Board *v.* Batten - - - - 283

LUNATIC—*Sale of Share of Lunatic in Real Estate—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *ss.* 116, 124]. The 124th section of the Lunacy Regulation Act, 1853, does not give jurisdiction to authorize the committee of a lunatic to sell the lunatic's undivided share of land to the owner of the other shares. *In re* Weld, a Lunatic - - - - 514

MAINTENANCE — Infant — Contingent legacy
See Infant. 2. [291

MARRIED WOMAN—Breach of trust—Indemnity of trustees - - - 595
See Trustee. 1.

—— Election—Female infant - - 124
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—— Separate examination - - - 171
See Settled Estates Act.

MARRIED WOMEN'S PROPERTY ACT - 709
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MEMORANDUM OF ASSOCIATION - 56
See Company. 2.

MISCONDUCT—Solicitor - - - 614
See Solicitor. 4.

MISREPRESENTATION—Sale of land 7, 309
See Vendor and Purchaser. 2, 4.

MISTAKE—*Lease—Rectification*]. Where there is mutual mistake in a deed or contract the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral the remedy is not rectification but rescission, but the Court may give to a defendant the option of taking what the plaintiff meant to give in lieu of rescission.—Plaintiff wrote a letter offering to the Defendant to make a lease to him of a portion of a block of three houses, consisting of the first, second, third, and fourth floors of all three houses, at a rent of £500 a year. Defendant wrote in answer, accepting the offer; and a lease was executed whereby all the upper floors of the block were demised by the Plaintiff to the Defendant at the rent of £500.—Plaintiff alleged that the first floor of one of the houses was included in the offer, and in the lease, by mistake, and that he always intended to reserve such first floor for his own use. Defendant denied that he accepted the offer, or executed the lease, under any mistake.—The Court having found upon the evidence that a common mistake was not sufficiently proved, but that mistake on the part of the Plaintiff was, gave judgment for rescission with an option to the Defendant to accept rectification instead. Paget *v.* Marshall - - - - 255

—— Will - - - - - 153
See Will. 3.

MONEY—Meaning of—Will - - 464
See Charity. 2.

MORTGAGE—*Foreclosure Action—Accounts and Inquiries—Rules of Supreme Court*, 1883, *Order xv., rr.* 1, 2]. In foreclosure actions where there is no preliminary question to be tried, the plaintiff may obtain, under Rules of Supreme Court,

MORTGAGE—*continued.*
1883, Order xv., an order for an account with all necessary inquiries, and the usual directions as in a common foreclosure judgment *nisi*. Such order should be applied for by summons in Chambers and not by motion in Court, and only the costs of a summons in Chambers attended by counsel will be allowed. Smith *v.* Davies - - 650

2. —— *Foreclosure—Form of Judgment—Personal Judgment against Mortgagor.*] Form of judgment in a foreclosure action, when a personal judgment is taken against the mortgagor on his covenant for payment of principal and interest.—The form in *Grundy* v. *Grice* (Seton on Decrees, 4th Ed. vol. ii. p. 1036 (Form No. 2)), modified. Hunter *v.* Myatt - - - - 181

3. —— *Practice—Foreclosure—Form of Judgment—Possession.*] Where an order *nisi* for foreclosure and possession had been made the order absolute also provided for possession and was made *ex parte*. Withall *v.* Nixon - 413

4. —— *Foreclosure Action—Form of Judgment—Subsequent Incumbrances—One Period for Redemption.*] In a foreclosure judgment against the mortgagor and subsequent incumbrancers, only one period for redemption will be fixed where none of the defendants appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled" or only that they "claim to be entitled" to charges upon the mortgaged premises. Doble *v.* Manley - - - - 664

5. —— *Priority—Incumbrance—Legal Estate—Trustee—Policy—Notice of Charge.*] A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.—The note in Sugden's Vendors and Purchasers (14th Ed. p. 379) on *Browne* v. *Savage* (4 Drew. 635) corrected. The Act 30 & 31 Vict. c. 144, is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se*. Accordingly where a first incumbrancer on a policy had not given such notice as prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice:—*Held*, that the second incumbrancer did not thereby obtain priority. Newman *v.* Newman - - - - - 674

—— Building society - - - 298
See Building Society. 2.

—— Insufficient security—Valuation - 268
See Trustee. 2.

MORTMAIN—Devise to charity—Church Building Act—Site with existing church.
See Charity. 3. [372

MUTUAL LOAN SOCIETY - - - 559
See Company. 10.

NATIONAL DEBT COMMISSIONERS—*Petition for re-transfer of Stock—Dismissal of former Petition by same Petitioner—Res Judicata—Discovery of Fresh Evidence—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 54, 55.] The

NATIONAL DEBT COMMISSIONERS—*continued.* jurisdiction given to the Court by sect. 55 of the National Debt Act, 1870, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Commissioners under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the Court is exercised. Therefore, if a petition for the re-transfer of stock is heard on its merits, and is dismissed on the ground that the Petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, without leave of the Court previously obtained.—Decision of Pearson, J., affirmed. *In re* MAY - - **516**

NEGLIGENCE—Trustee—Insufficient mortgage *See* TRUSTEE. 2. [**268**

NEW TRUSTEES—Appointment under Trustee Acts - - - **77, 529, 725**
See TRUSTEE ACTS. 1, 2, 3.

—— Power of appointing - - - **1**
See SETTLEMENT. 1.

NOTICE—Winding-up—Proof - - **634**
See COMPANY. 6.

NUISANCE—*Injunction—Fouling Stream—Quia Timet Action.*] In order to maintain a *quia timet* action to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable.—*Earl of Ripon* v. *Hobart* (3 My. & K. 169), *Attorney-General* v. *Corporation of Kingston* (13 W. R. 888), and *Salvin* v. *North Brancepeth Coal Company* (Law Rep. 9 Ch. 705) discussed.—The Plaintiff was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which it was essential that the water should be very pure. The Defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about one mile and a half higher up than the Plaintiff's mills, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for the Plaintiff's manufacture, and his trade would be ruined. The Plaintiff did not allege that he had as yet sustained any actual injury. The Defendants said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—*Held*, that, it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs.—But the dismissal was expressly declared to be without prejudice to the right of the Plaintiff to bring another action hereafter, in case of actual injury or imminent danger. FLETCHER *v.* BEALEY **688**

OCCUPATION—Beneficial—Rates - **470, 474**
See COMPANY. 7, 8.

OUTGOINGS—Will—Tenant for life—Drainage
See WILL. 4. [**431**

PARTICULARS OF DEMAND - - **119**
See PRACTICE. 9.

PARTIES—Action by some members of committee against others - - **426**
See CHARITY. 1.

PARTNERSHIP—*Firm of Solicitors—Deposit of Bonds with one Partner—Liability of Firm—Scope of Business.*] Trustees under a will deposited certain bonds payable to bearer with P., a member of the firm of solicitors who were acting for the estate. His partners had no knowledge of this, but letters referring to the bonds were copied in the letter-book of the firm and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. P. paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. P. misappropriated the bonds:—*Held* (reversing the judgment of Denman, J.), that the cheques, letters, and entries were too ambiguous to affect the other partners with acquiescence in P. having the custody of the bonds as part of the partnership business, and that they could not be held liable for their misappropriation.—*Harman* v. *Johnson* (2 E. & B. 61) and *Earl of Dundonald* v. *Masterman* (Law Rep. 7 Eq. 504) considered. CLEATHER *v.* TWISDEN [**C. A. 340**

PATENT—*Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19—*Application for Leave to amend Specification by way of Disclaimer—Appeal to the House of Lords in Action relating to the Patent, after Application for Leave to amend—"Action for Infringement"—Pending Action—"Other Legal Proceeding"—Revocation of Patent.*] In an action for infringement of their patent, the Plaintiffs obtained a judgment against the Defendants S. & H., but on appeal, that judgment was reversed as against S., but maintained as against H. (26 Ch. D. 700). The Plaintiffs afterwards applied under the Patents, Designs, and Trade-marks Act, 1883 (46 & 47 Vict. c. 57), s. 18, for leave to amend their specification by way of disclaimer, which application was opposed by the Defendants. Subsequently, H. lodged an appeal in the House of Lords against the decision of the Court of Appeal. The Comptroller-General then declined to proceed with the Plaintiffs' application until the opinion of the Court had been taken under sect. 19 of the Act, as he doubted whether or not the appeal to the House of Lords was a pending litigation within sect. 18, subsect. 10 of the Act, and the Plaintiffs thereupon took out a summons that they might be at liberty to disclaim:—*Held*, that the words "other legal proceeding in relation to a patent," in sect. 18, sub-sect. 10, refer to a proceeding for the revocation of a patent, and that an "action for infringement . . . . pending" means an action before judgment, and that being so there was no action for infringement or other legal proceeding pending, and the summons was dismissed. CROPPER *v.* SMITH (No. 2) - - - - **148**

PATENT—*continued.*

2. —— *Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Threat of Legal Proceedings — Injunction—Infringement.*] On motion under the Patents, Designs, and Trade-marks Act, 1883, s. 32, to restrain the publication of advertisements warning the public that the invention claimed by the applicant is an infringement of patent rights claimed by the advertisers, and that all necessary proceedings will be taken to protect such rights should any attempt be made to manufacture or supply the invention claimed by the applicant, the applicant, as a condition precedent to obtaining an injunction, must shew that there has been no infringement on his part. And if in opposition to the motion a case of alleged infringement is raised by the respondents' affidavits, an injunction will not be granted, although the respondents decline to take legal proceedings in respect of such alleged infringement against the applicant. Barney *v.* United Telephone Company - - - 394

PAYMENT INTO COURT—Redemption of mortgage—Bankruptcy of mortgagor 402
See Vendor and Purchaser. 6.

PAYMENT OUT OF COURT—Lands Clauses Act
See Lands Clauses Act. 2. [100

—— Staying proceedings pending appeal 18
See Practice. 13.

PENDING ACTION—Patent — Amendment of specification - - - 148
See Patent. 1.

PEPPERCORN RENT—Receipt for - 661
See Vendor and Purchaser. 8.

PERPETUITY—Will - - - 436
See Will. 6.

PETITION—Winding-up - - 65, 183
See Company. 4, 5.

POLICY OF INSURANCE—Notice of charge—Priority - - - - 674
See Mortgage. 5.

POLLUTION OF STREAM - - - 688
See Nuisance.

POSSESSION—Bill of sale - - - 682
See Bill of Sale.

—— Order for foreclosure - - - 413
See Mortgage. 3.

POWER—*Appointment—Fraud on Power—Appointment upon a Bargain to settle the appointed Property.*] Real estate was vested in trustees under a will, upon trust as to one moiety to pay the rents to A. for life, and after his death to convey it to and among his children who should attain twenty-one, and if he had no such child then on the trusts of the other moiety, and as to the other moiety on similar trusts for B. and his children. The will empowered the trustees if they should think fit to convey the shares of A. and B., or either of them, to them in fee. In 1882 A. and B., the younger of whom was of the age of sixty-two, and neither of whom had any child, having incumbered their interests, and being pressed by their mortgagees, applied to the trustees to exercise the power of giving them their shares of the estate in fee. An arrangement was made between A. and B. and the trustees that

POWER—*continued.*

the trustees should, in exercise of their power, convey the estate to A. and B., as tenants in common in fee, and that, subject to such mortgages as should be approved by the trustees for raising money to pay off the existing mortgages, a part of the property should be settled upon trusts which gave A. and B. respectively powers of appointment in favour of their respective children and remoter issue, and powers of jointuring their wives. The trustees accordingly conveyed to A. and B., as tenants in common in fee, and the re-settlement, which vested the equity of redemption in new trustees, with a power of sale, upon the trusts which had been arranged, was made by a deed which recited that the trustees had exercised the power on condition that the settlement should be made:—*Held*, on appeal, that looking at all the circumstances of the case, it was not shewn that the bargain for the re-settlement induced the appointment, or that if the bargain had not been entered into the appointment would not have been made, and that the appointment and settlement were therefore valid, and that the trustees of the settlement could make a good title. *In re* Turner's Settled Estates - - - - - C. A. 205

—— Of sale — Extinguishment — Disentailing deed - - - - - 93
See Settlement. 2.

—— Of sale—Settled Land Act - - 378
See Settled Land Act. 1.

—— To appoint trustees - - - 1
See Settlement. 1.

PRACTICE—*Adding Parties—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 11.] One of two executors having absconded, the other executor sued a mortgagor. The Court refused on the application of the Defendant to add the absconding executor as Defendant. Drage *v.* Hartopp 414

2. —— *Appeal for Costs—Special Leave—Judicature Act*, 1873, *s.* 49.] Where an appeal from an order as to costs which are left by law to the discretion of the Judge is brought by leave of the Judge under the 49th section of the Judicature Act, 1873, the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order unless there has been a disregard of principle or misapprehension of facts. *In re* Gilbert. Gilbert *v.* Hudlestone [C. A. 549

3. —— *Chambers—Summons—Determination of Questions at issue in Action—Rules of Supreme Court*, 1883, *Order* LV., *r.* 10.] Except to the extent to which special provisions are made by the rules, as, for instance, by Order XV., the plaintiff in an action is not entitled to take out a summons for the determination of the questions which are at issue in the action, and which will properly be decided at the trial. Borthwick *v.* Ransford - - - - - 79

4. —— *Chambers—Administration—Infants—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 3, 10.] Discussion of the principles on which the Court will act in the exercise of its discretion under Order LV., r. 10, whether or not to make a general order for administration. *In re* Wilson. Alexander *v.* Calder - - - 457

PRACTICE—*continued.*

5. —— *Change of Parties—Trustee in Bankruptcy—Adoption by Trustee of Bankrupt's Defence—Costs*] An interlocutory order for an injunction and receiver having been made against the Defendants in an action, they gave notice of appeal, and shortly afterwards became bankrupt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to the Plaintiff that he should not proceed with the appeal. Shortly after this the trustee entered an appearance and called for a statement of claim. He declined to undertake to pay the costs of the appeal incurred by the Plaintiff before the notice that the appeal would not be proceeded with, and the appeal came on that the question as to the costs might be decided:—*Held*, that the appeal must be dismissed with costs to be paid by the trustee, for that having adopted the defence of the bankrupts he had placed himself in their position as to the whole of the action, and could not reject part of the proceedings in it. BORNEMAN *v.* WILSON - - - **C. A. 53**

6. —— *Costs—Set-off—Rules of Supreme Court, 1883, Order* LXV., *r.* 27, *sub-s.* 21.] Under subsect. 21 of rule 27 of Order LXV. of the Rules of the Supreme Court, 1883, costs which a party is ordered to pay personally may be set off against costs which he is entitled to receive out of a fund in Court. BATTEN *v.* WEDGWOOD COAL AND IRON COMPANY - - - - - **317**

7. —— *Evidence—Affidavit—Cross-examination—Production of Deponent—Expenses—Rules of Supreme Court, 1883, Order* XXXVII., *r.* 21; *Order* XXXVIII., *r.* 28—15 & 16 *Vict. c.* 86, *ss.* 38, 41.] The direction in Order XXXVIII., rule 28, of Rules of the Supreme Court, 1883, that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Order XXXVII., rule 21, of the same rules, which provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial, is not confined to the cross-examination of the deponent before the Court at the trial of the action, but applies also to a cross-examination before the Chief Clerk in Chambers or before an Examiner. BACKHOUSE *v.* ALCOCK - - - - - **669**

8. —— *Discovery—Privileged Communication—Answer to Interrogatory—Sufficiency of—Professional Confidence—Solicitor and Client.*] The privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the case of the client in the action.—A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to an agreement the specific performance of which it was the object of the action to enforce.—The defendant declined to answer the interrogatory, so far as it related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action:—*Held*, that he must make a further answer. FOAKES *v.* WEBB - - - - - - **287**

9. —— *Particulars of Demand.*] Where a plaintiff claims to recover a definite sum made up of a number of items he will be ordered to give particulars of demand, though he will not be ordered to do so if he only claims an account.—The Plaintiffs by their statement of claim alleged that they and their testator had paid sums of money under a contract of suretyship under which the Defendant was also liable, and that, after deducting contributions received from other quarters, the balance paid by them was £16,233; that the Defendant had paid nothing, and was liable to pay to the Plaintiffs one half of this balance, and the Plaintiffs claimed payment of £8116. The Defendant, before putting in his defence, applied for an order that the Plaintiffs might give particulars of the sums making up the £16,233. The application was refused by Mr. Justice Pearson:—*Held*, on appeal, that, as the Plaintiffs did not ask merely for an account, but claimed payment of a definite sum, they must give particulars of demand. BLACKIE *v.* OSMASTON **[C. A. 119**

10. —— *Security for Costs of Appeal.*] There is no general rule that an insolvent appellant will be exempted from giving security for the costs of the appeal because the case involves a question of law which has not been previously considered by a Court of Error.—*Rourke* v. *White Moss Colliery Company* (1 C. P. D. 556) explained. FARRER *v.* LACY, HARTLAND, & Co. - - - **482**

11. —— *Security for Costs—Plaintiffs out of Jurisdiction—One of Several Plaintiffs coming within Jurisdiction before Appeal.*] An action was brought by a mercantile firm, all the members of which were in America, against a firm at Manchester. The Defendants put in a defence and counter-claim, and then applied to the Judge for an order for the Plaintiffs to give security for costs. The Plaintiffs filed an affidavit stating that they with other persons carried on business at Manchester, and that the firm there had assets amounting to £2000. The Judge refused the application. On the appeal the Plaintiffs produced an affidavit stating that since the order one of the Plaintiffs had come to Manchester for the purpose of carrying on the action:—*Held*, by the Court of Appeal, that the affidavit as to the property of the Plaintiffs in England was ambiguous and was not sufficient to support the order in the Court below.—But *held*, that as one of the Plaintiffs had come to England since the order was made, although for a temporary purpose, the Defendants were not entitled to security for costs, and therefore the order must be affirmed.—*Redondo* v. *Chaytor* (4 Q. B. D. 453) followed. EBRARD *v.* GASSIER - - - **C. A. 232**

12. —— *Security for Costs—Trustee of Bankrupt's Estate suing in his Official Name—Insolvency—Bankruptcy Act, 1883* (46 & 47 *Vict. c.* 52), *s.* 83—*Rules of Supreme Court, 1883, Order* XVII.,

PRACTICE—*continued.*

rr. 4, 5.] A trustee of the property of a bankrupt brought an action in his official name, his own name not being mentioned. The Defendants moved for security for costs on the ground of his insolvency, and of his suing solely in his official name. Evidence was given that he had been bankrupt ten years previously, and had also compounded with his creditors four years before the action was brought:—*Held* (affirming the decision of Pearson, J.), that the evidence of the insolvency of the Plaintiff was insufficient; and that the fact of his suing solely in his official name was not a ground for ordering him to give security for costs. —When a trustee in bankruptcy suing in his official name is removed, and a new trustee appointed, the new trustee must obtain an order to continue the action, and give notice thereof to the other parties, under Order XVII., rr. 4, 5.—Whether a trustee in bankruptcy suing in his official name would, if insolvent, be ordered to give security for costs, *quære.*—*Denston* v. *Ashton* (Law Rep. 4 Q. B. 590) questioned. Pooley's Trustee in Bankruptcy *v.* Whetham - - - **C. A. 38**

13. —— *Stay of Proceedings pending Appeal —Payment out of Fund in Court—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 16.] In the absence of special circumstances it is not the practice of the Court to retain in Court pending an appeal a fund which has been ordered to be paid out, because there is an appeal from the order.—An order directing the payment of a fund out of Court to the Plaintiff having been made just before the commencement of the Long Vacation, and an appeal having been presented, a suspension of the payment out was granted over the Long Vacation, in order to enable the Appellant to apply to the Court of Appeal.—*Wilson* v. *Church* (12 Ch. D. 454) and *Walburn* v. *Ingilby* (1 My. & K. 79) considered.—On appeal, it being shewn that the Plaintiff had been abroad for two years, and that the applicant could not discover his address, it was held that payment out ought to be stayed if the applicant would give security to pay to the Plaintiff interest at £4 per cent. on the present value of the funds in Court, and to make good to the Plaintiff, if the appeal was unsuccessful, the difference between the highest market price of the investments at any time before the hearing of the appeal and their market price on the day of the hearing of the appeal. Bradford *v.* Young. *In re* Falconar's Trusts [**C. A. 18**

14. —— *Third-party Procedure — Counterclaim by Third Party against Plaintiff—Rules of Supreme Court*, 1883, *Order* XVI., *rr.* 48, 52, 53; *Order* XIX., *r.* 3.] The Court has no power to give a third party who has been served with notice by a defendant under Order XVI., r. 48, leave to file a counter-claim against the original plaintiff. Eden *v.* Weardale Iron and Coal Company [**C. A. 333**

—— Foreclosure - - **181, 413, 650, 664**
See Mortgage. 1, 2, 3, 4.

—— Inspection of books of company - **620**
See Company. 9.

—— Point of law—Demurrer - - **372**
See Charity. 3.

PRACTICE—*continued.*

—— Settled Land Act - - **378, 628**
See Settled Land Act. 1, 2.

—— Trustee Acts - - - **77, 529, 725**
See Trustee Acts. 1, 2, 3.

PRE-EMPTION—Right of - - - **486**
See Commissioners of Sewers.

PREFERENCE SHARES—Alteration in rights—Ultrà vires act - - - **56**
See Company. 2.

PREMIUM—Articled clerk—Death of solicitor
See Solicitor. 1. [**409**

PREROGATIVE - - - - **643**
See Crown.

PRESUMPTION—Ademption of legacy - **552**
See Will. 1.

PRINCIPAL AND AGENT—Committee of voluntary fund - - - - **426**
See Charity. 1.

PRIORITY—Administration of assets of company —Action by debenture-holder - **317**
See Company. 1.

—— Mortgages - - - - **674**
See Mortgage. 5.

—— Mortgage to building society - **298, 398**
See Building Society. 2, 3.

PRIVILEGE—Professional confidence - **287**
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RAILWAY—Abandonment of—Costs - **237**
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RAILWAY COMPANY—*Abandonment—Parliamentary Deposit — Abortive Undertaking — Promoters and Parliamentary Agents.*] Under the usual provision, in an Act incorporating a railway company, that in the event of the undertaking being abortive the parliamentary deposit shall either be forfeited to the Crown, or, in the discretion of the Court, be wholly or in part applied, as part of the assets of the company, for the benefit of the creditors thereof, the Court will not apply the deposit for the benefit of all the creditors without distinction as to the nature and merit of their claims; and, accordingly the promoters and the parliamentary agents claiming in respect of costs incurred in obtaining the Act, or in relation to the promotion of the company, not being "meritorious creditors" (*In re Lowestoft, Yarmouth, and Southwold Tramways Company* (6 Ch. D. 484)), will not be admitted to share in the distribution of the fund. *In re* Birmingham and Lichfield Junction Railway Company **652**

RAILWAY COMPANY—*continued.*

2. —— *Landowner—Branch Railway—Siding—Right of User—Renewing Junction—Board of Trade Order—Interlocking and Signalling Apparatus—Liability of Landowner—Removing Junction—Injunction—Regulation of Railways*—3 & 4 *Vict. c.* 97, *s.* 5—5 & 6 *Vict. c.* 55, *ss.* 4, 6, 12—*Railways Clauses Consolidation Act*, 1845, *s.* 76.] The Plaintiff, and his predecessors in title, as owners of land adjoining a single line of railway, had ever since the year 1861 used a junction siding connecting the railway with a foundry on their land, the siding being the only access to the foundry. The Defendants, the railway company, having doubled their line, the Board of Trade, acting on the report of their inspector and as a condition for certifying the line to be fit for traffic, required the company either to provide the junction of the siding with the modern and improved system of interlocking and signalling apparatus, or to remove the junction, which was of an old-fashioned description. The company then called upon the Plaintiff to execute the work or pay the costs of it, but this the Plaintiff declined to do, whereupon the company took up the junction points:—*Held*, by Bacon, V.C., that the Plaintiff had, under sect. 76 of the Railways Clauses Consolidation Act, 1845, a statutory right to the use of his siding in connection with the company's railway, the company's parliamentary powers being subject to that right; and an injunction was therefore granted restraining the company from continuing to prevent communication between his siding and the railway, and compelling the company to restore the junction.—*Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (Law Rep. 9 Ch. 331) distinguished. —*Held*, on appeal, that as the Plaintiff's predecessors in title had acquired a perpetual right to use the siding under a clause as to sidings in an old local Act for making a tramway, which had since been converted into the railway of the Defendants, and the subsequent Acts contained saving clauses sufficient to protect all rights acquired by the Plaintiff under the old Act, the case did not depend on the Railways Clauses Act, and that the Plaintiff retained the right acquired under the old Act to use the siding without contributing to the expense of the new apparatus, such Act containing nothing to oblige the Plaintiff to make or pay for the interlocking apparatus.—*Held*, also, that if the case had turned on the 76th section of the Railways Clauses Act, the Court would not have decided the question whether the Plaintiff was bound to pay for the interlocking apparatus, without first ascertaining what, in the year 1845, was included in the terms "offset plates" and "switches" used in that section. WOODRUFF *v.* BRECON AND MERTHYR TYDFIL JUNCTION RAILWAY COMPANY - - - C. A. 190

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—— Transfer of shares—Refusal of directors to register - - - - 363
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—— **Order XVI., r. 11** - - - 414
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—— —— **rr. 48, 52, 53** - - - 333
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—— **Order XVII., rr. 4, 5** - - - 38
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—— **Order XIX., r. 3** - - - 333
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—— **Order XXV., rr. 1, 2, 3** - - 372
See CHARITY. 3.

—— **Order XXXVII., r. 21** - - - 669
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—— **Order XXXVIII., r. 28** - - 669
See PRACTICE. 7.

—— **Order LV., r. 2 (8), (18)** - - 529
See TRUSTEE ACTS. 2.

—— —— **rr. 3, 10** - - - - 457
See PRACTICE. 4.

—— —— **r. 10** - - - - 79
See PRACTICE. 3.

—— **Order LVIII., r. 16** - - - 18
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—— **Order LXV., r. 27, sub-s. 21** - - 317
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SETTLED ESTATES ACT — *Petition — Married Woman—Separate Examination—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1.] In the case of a woman married before the commencement of the Married Women's Property Act, 1882, sect. 1 of the Act applies only as to property acquired by her after the commencement of the Act.—Therefore, if such a woman is a petitioner, or a respondent to a petition, under the Settled Estates Act, 1877, relating to property her interest in which was acquired before the commencement of the Act of 1882, she must be examined separately, as provided by sect. 50 of the Act of 1877. *In re* Harris' Settled Estates [171

SETTLED LAND ACT, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 56, *sub-s.* 2, *s.* 58, *sub-s.* 1, *cl.* (*ix.*)—*Limited Owner—Tenant for Life.*] Testator by will, dated the 8th of August, 1883, limited an estate to the use of trustees for a term of 1300 years, and subject thereto to his second son H. S. for life, with remainders over in strict settlement. The trusts of the term were to raise portions, to pay annuities, H. S. himself being one of the annuitants, and to apply the residue as a sinking fund to pay off mortgage debts and other charges. The income of the estate was about £26,000 a year, and the amount of the charges about £175,000. It was estimated that the trusts of the term would require from fifteen to twenty years for their fulfilment. The testator directed that the trustees should "during the continuance of the last mentioned trusts" enter into and hold possession of the rents and profits of the estate, "and not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned. Very full powers of management were given to the trustees, and the testator provided that when all the trusts of the term should have been fully paid and satisfied the term should cease. He moreover gave to the trustees such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882:—*Held*, that H. S. was not a mere annuitant, but was tenant for life, or a person having the powers of a tenant for life, of the estate within the meaning of sect. 58, sub-sect. 1, cl. (ix.) of the Settled Land Act, 1882, and that his consent was necessary under sect. 56, sub-sect. 2, to the effectual exercise by the trustees of the powers of sale and enfranchisement contained in the will. *In re* Clitheroe Estate 378

2. —— (45 & 46 *Vict. c.* 38), *s.* 34—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 47—*Purchase-money of Lands subsequent to beneficial Lease—Tenant for Life and Remainderman—Application of Income.*] Sect. 34 of the Settled Land Act, 1882, and 74 of the Lands Clauses Consolidation Act, 1845, are similar enactments, so that where the facts are similar decisions on sect. 74 are authorities on sect. 34.—As between tenant for life and remainderman, where lands subject to a beneficial lease are sold under the Settled Land Act, 1882, the tenant for life will, during the unexpired period of the term, be entitled to so much only of the income of the invested purchase-moneys as equals the rents under the lease, and the rest of that income must be accumulated and invested for the benefit of the inheritance until the date when the lease would have expired.—*In re Mette's Estate* (Law Rep. 7 Eq. 72), *In re Wootton's Estate* (Law Rep. 1 Eq. 589), and *In re Wilkes' Estate* (16 Ch. D. 597) approved. Cottrell *v.* Cottrell - 628

SETTLEMENT—*Power of appointing new Trustees—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 31, 33.] A settlement of real estate of which there were four trustees, provided that if the trustees thereby appointed "or any future trustee or trustees to be appointed in the place of them or any of them as hereinafter mentioned" should die or be desirous of being discharged, &c., it should be lawful for "the surviving or continuing trustee or trustees for the time being," with the consent of the tenant for life or in tail for the time being entitled in possession, to appoint a new trustee or new trustees in the place of the trustee or trustees so dying, &c. In 1872, four new trustees were appointed under the Trustee Act, 1850, in the place of two deceased and two retiring trustees. After this a decree was made for carrying the trusts of the settlement into execution. Two of the trustees of 1872 being dead, and another desiring to retire, the Plaintiff, who was an infant tenant in tail in possession, took out a summons to appoint new trustees, W. the continuing trustee took out a summons asking that he might be at liberty to appoint new trustees. A reference to chambers being directed, W. proposed new trustees whom the Court considered to be proper persons, but to whom all the persons beneficially interested objected:—*Held* (affirming the decision of Pearson, J.), that the persons nominated by W. must be appointed, though the tenant in tail in possession did not consent, for that as the power in the settlement only applied to filling up vacancies in the number of original trustees, or trustees appointed under the power, it had come to an end when new trustees were appointed by the Court in 1872, and that the fetter imposed by the settlement on the exercise of that power did not apply to the new power given to the continuing trustee by the Conveyancing and Law of Property Act, 1881, which enabled him to fill up vacancies in a body of trustees not coming within the scope of the power in the settlement. Cecil *v.* Langdon - C. A. 1

2. —— *Power of Sale—Extinction—Disentailing Deed.*] An estate was devised to uses to secure certain annuities, and subject thereto in strict settlement, with power for trustees to sell at the request of the tenant for life under the will.

SETTLEMENT—*continued.*

The estate was disentailed and resettled (the existing life estate being postponed to certain charges and the powers of the will being expressed to be kept alive):—*Held*, that the trustees for sale and the tenant for life could make a good title. *In re* WRIGHT'S TRUSTEES AND MARSHALL [93

3. —— *Windfalls — Larch Trees — Real and Personal Estate—Tenant for Life.*] At the death of a testator, the owner in fee of larch plantations, a large number of the larch trees had been more or less uprooted by extraordinary gales:—*Held*, that trees which might continue to live but could not grow as ordinary trees, belonged to the executors, and trees that would continue to grow, but would have to be cut for the proper cultivation of the plantations belonged to the tenant for life under the will. *In re* AINSLIE. SWINBURN *v.* AINSLIE - - - - - 89

4. —— *Windfalls—Larch Trees—Tenants for Life.*] An estate which comprised larch plantations was settled as personalty by the medium of trustees for sale. The trustees had power to pay all outgoings, and to determine what part of the property was *corpus* and what income. A large number of trees were blown down by extraordinary gales, and the plantations were so much injured that it became necessary to clear and replant the ground.—The income from the plantations was derived from thinnings, and varied considerably according to the age of the trees. The trees blown down were about thirty-five years old, and in ordinary course would have come to full maturity in fifteen or twenty years, and they would then have been cut down and the ground cleared and replanted:—*Held*, the proceeds of the sale of the larch trees blown down and felled by reason of the gales did not belong to the equitable tenant for life, but must be invested by the trustees. But the Court, having regard to the average income which would have been derived from the plantations if no gales had occurred, fixed an annual sum to be paid to the tenant for life out of the income, and, if necessary, the capital of the invested fund; subject to the right of the trustees to have recourse to the fund in order to replant the plantations. *In re* HARRISON'S TRUSTS. HARRISON *v.* HARRISON - - - C. A. 220

—— Covenant to settle—Severance of joint tenancy - - - - 416
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—— Female infant—Covenant to settle - 124
See ELECTION.

SEWERS—Commissioners of - - 486
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—— Vesting in local authority - - 283
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SHARES—Preference—Rights of shareholders 56
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—— Transfer of—Shareholder indebted to company - - - - - 363
See COMPANY. 3.

SIDING—Railway—Rights of landowner - 190
See RAILWAY COMPANY. 2.

SOLICITOR—*Articled Clerk—Return of Premium.*] A solicitor who had received a premium on

SOLICITOR—*continued.*

taking an articled clerk died during the term of the articles:—*Held*, that his estate was not liable for the return of any part of the premium. FERNS *v.* CARR - - - - 409

2. —— *Bill of Costs—Taxation—"Assignee" of Costs*—6 & 7 *Vict. c.* 73, *s.* 37.] Whether an assignee of costs due to a solicitor is such an "assignee" of the solicitor as is, under sect. 37 of the Act 6 & 7 Vict. c. 73, entitled to obtain a taxation of the costs, *quære*.—But if an assignee of costs can obtain a taxation, he cannot obtain an order of course to tax one bill of costs out of several, even if that bill only has been assigned to him. An order to tax one bill out of several alone can only be obtained by means of a special application. *In re* WARD - - - 719

3. —— *Lien—Change of Solicitor in Action.*] In a suit instituted by a debenture-holder of a company, on behalf of himself and the other debenture-holders, against the company the original Plaintiff became bankrupt in the course of the proceedings, and another debenture-holder was substituted for him as Plaintiff.—An order was made that the solicitors of the first Plaintiff should, without prejudice to their lien (if any) deliver up to the solicitor of the second Plaintiff all documents in their possession relating to the conduct and prosecution of the suit:—*Held*, that the solicitors of the first Plaintiff had no lien on the documents which could entitle them to priority in respect of their costs. BATTEN *v.* WEDGWOOD COAL AND IRON CO. - - - - 317

4. —— *Misconduct—Striking off the Roll—Jurisdiction of Court of Appeal.*] From the evidence given by a solicitor in an action in the Court of the County Palatine of Lancaster he appeared to have been guilty of gross misconduct in his character of solicitor as to one of the mortgages to which the action related. The Plaintiffs in the action having appealed, the conduct of the solicitor came under the consideration of the Court of Appeal, who directed the official solicitor to take proceedings. The official solicitor accordingly moved in the Court of Appeal for an order calling on the solicitor to explain his conduct, or that he might be struck off the roll:—*Held*, that the Court of Appeal had jurisdiction to entertain the application, although not brought before them by way of appeal. The solicitor had not taken out his certificate for several years and did not take any notice of the application. The Court, under the special circumstances of the case, did not think fit to strike him off the roll or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the Court. *In re* WHITEHEAD - - - 614

—— Liability—Scope of business—Deposit of bonds - - - - 340
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—— Privilege—Professional confidence - 287
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SPECIFIC PERFORMANCE—*Action for—Alternative Claim for Damages, Effect of—Amendment of Pleadings.*] The Plaintiff by his statement of claim claimed specific performance of a contract by which he agreed to sell and the Defendant agreed to purchase the lease, goodwill, fixtures

SPECIFIC PERFORMANCE—*continued.*

and stock-in-trade of a business; the Plaintiff alleging that he was and always had been able and willing to perform the contract, but that the Defendant refused to perform the same. The statement of claim in the alternative claimed £100 as liquidated damages fixed by the contract for the refusal to perform the contract. The statement of defence alleged false representations by the Plaintiff as to the character of the business, and denied that the Plaintiff was able and willing to perform the contract. The Plaintiff, after the close of the pleadings, gave notice to the Defendant that, unless the Defendant completed the purchase within a week, he should re-sell the business, which he accordingly did. No amendment of the pleadings was then asked for by the Plaintiff, and the action went on to trial. At the trial before Bacon, V.C., the Plaintiff's counsel, admitting that the claim for specific performance must be abandoned, sought to recover the £100 as liquidated damages. He did not apply for any amendment of the pleadings. The Vice-Chancellor dismissed the action on the ground that the claim for specific performance failing through the Plaintiff's own act the alternative claim for damages must fall also:—*Held*, on appeal, affirming the decision of Bacon, V.C., that, in the absence of any amendment of the pleadings (which ought not at that stage of the action to be allowed), the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, according to the practice existing before the Judicature Act in the Court of Chancery, and that the Plaintiff, having by his own act rendered specific performance impossible, was not in such action entitled to damages. Hipgrave *v.* Case [C.A. 356

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29 Car. 2, c. 3, s. 4—*Frauds* - - 305
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9 Geo. 2, c. 36—*Mortmain* - - 372
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57 Geo. 3, c. xxix.—*Metropolitan Paving* 486
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3 & 4 Will. 4, c. 106, s. 2—*Inheritance* - 327
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1 Vict. c. 26, s. 24—*Wills* - - - 709
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—— —— s. 26 - - - - 66
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3 & 4 Vict. c. 97, s. 5—*Railways* - 190
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5 & 6 Vict. c. 55, ss. 4, 6, 12—*Railways* 190
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6 & 7 Vict. c. 73, s. 37—*Solicitors* - 719
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8 & 9 Vict. c. 18, s. 69—*Lands Clauses* - 100
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—— —— s. 74 - - - - 628
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—— —— ss. 80, 85 - - - 237
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8 & 9 Vict. c. 20, s. 76—*Railway Clauses* 190
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10 & 11 Vict. c. 17, s. 68—*Waterworks Clauses*
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13 & 14 Vict. c. 60, ss. 32, 34—*Trustee* - 77
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14 & 15 Vict. c. xci. s. 54—*City of London Sewers* - - - - 486
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15 & 16 Vict. c. 55, s. 6—*Trustee Extension* 529
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15 & 16 Vict. c. 80, ss. 11, 26, 27—*Master in Chancery Abolition* - - 529
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25 & 26 Vict. c. 102, ss. 96, 97—*Metropolis Local Management* - - - 431
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30 & 31 Vict. c. 144—*Life Insurance* - 674
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36 & 37 Vict. c. 66, s. 16—*Judicature* - 529
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37 & 38 Vict. c. 42, s. 42—*Building Societies* 298, [398
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40 & 41 Vict. c. 18, s. 50—*Settled Estates* 171
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45 & 46 Vict. c. 75, s. 1—*Married Women's Property* - - - - 171
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TRADE-MARK — *Patents, Designs and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 85—*Restricted User—Entry of Undertaking on Register.*] The entry, on the register of two similar trade-marks in the same class, of a note that the use of the marks registered is restricted by an agreement between the respective owners (the effect of which is not stated) is irregular, and contrary to the provisions of the Patents, Designs and Trade-marks Act, 1883; but, following *In re Rathbone & Co.* (Seb. Dig. 395), a note of the mutual undertakings not to use the marks except in a certain manner and within specified districts may be entered on the register. *In re* MITCHELL & CO.'S TRADE-MARK. *In re* HOUGHTON & HALLMARK'S TRADE-MARK - - - - 666

TRANSFER OF SHARES—Refusal of directors to register—Shareholder indebted to company - - - - - 363
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TRUSTEE—*Liability—Breach of Trust—Concurrence of Cestui que Trust—Right to Indemnity—Married Woman.*] Where a *cestui que trust*, who is party to a breach of trust, is a married woman, and the trustees claim a right of retainer against her life interest in the settled funds to indemnify them against their breach of trust, they are bound to shew that she acted for herself in the breach of trust, and was fully informed of the state of the case. SAWYER *v.* SAWYER - - C. A. 595

2. —— *Liability—Improvident Investment—Mortgage on House Property — Employment of Agents— Valuation by Mortgagor's Surveyor—Selection of Valuer—Negligence—Liability of Trustees.*] The rule that trustees, acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of the agent so employed, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business —Trustees empowered to invest on mortgage lent under the advice of their solicitors a sum of £5000 upon

TRUSTEE—*continued.*
mortgage of a freehold house and grounds at Liverpool, valued to them at from £7000 to £8000. The trustees did not exercise their own judgment as to the choice of a valuer, but accepted the suggestion of their solicitors that a London surveyor who had introduced the security to them, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage, should value the property for the trustees, and they acted upon the report of this valuer, which was of an inflated character.—The mortgagor afterwards became bankrupt, and the property would not realize the sum advanced:—*Held*, that the trustees were jointly and severally liable to replace the sum advanced, with interest at 4 per cent. from the date of the loan. FRY *v.* TAPSON - - - - - - 268

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TRUSTEE ACTS—*Practice—Appointment of new Trustees—Appointment of existing Trustees as sole Trustees in place of themselves and a bankrupt and absconding Trustee — Trustee Act*, 1850 (13 & 14 *Vict. c.* 60, *ss.* 32, 34.] It is the settled practice of the Court under the Trustee Acts, when there is a continuing trust, not simply to remove or discharge a trustee, without appointing a new trustee in his place, by appointing the remaining trustees to be sole trustees in place of themselves and him. And, though the Court will deviate from this rule and make such an appointment if the trustees have no duty to perform but to distribute a fund which is immediately divisible, it will adhere to the ordinary rule if there is a continuing trust as regards even a relatively small part of the trust fund. *In re* LAMB'S TRUSTS - - - - 77

2. —— *Appointment of new Trustees—Petition—Vesting Order in Chambers—Transfer of Stock—Business in Chambers—Jurisdiction—Trustee Act*, 1850, *ss.* 2, 32, 35, 40—*Trustee Extension Act*, 1852, *s.* 6—*Master in Chancery Abolition Act*, 1852 (15 & 16 *Vict. c.* 80), *ss.* 11, 26, 27—*Despatch of Business Act*, 1855 (18 & 19 *Vict. c.* 134), *s.* 16—*Cons. Ord.* XXXV., *r.* 1—*Judicature Act*, 1873, *s.* 16—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2 (8), (18)—*Statute Law Revision and Civil Procedure Act*, 1883, *s.* 5.] On a petition for the appointment of new trustees and a vesting order, an order was made in Court on the 28th of June, 1884, that two or more proper persons should be appointed trustees, and that an inquiry should be made of what the trust funds consisted; and the parties were to be at liberty to apply in Chambers for an order to vest the trust property in the new trustees when appointed. On the 22nd of July, before any certificate as to the trust funds had been made, an order was made in Chambers appointing new trustees, and directing that the right to call for a transfer of, and to transfer into their own names, certain sums of stock specified in the order "may" vest in the new trustees. This order mentioned, but did not recite, the order of the 28th of June. The Bank of England refused to act on it, and Bacon, V.C., on the 28th of November, made an order directing them to do so. The bank appealed:—*Held*, that, the matter having been properly brought before the Court on petition, the Judge had power under the provisions of the Masters Abolition Act, 1852 (15 & 16 Vict. c. 80), to dispose in Chambers of such parts of the matters brought before him on the petition as he thought could be more conveniently disposed of in Chambers than in Court, and that there was therefore jurisdiction to make the order of the 22nd of July.—*Frodsham* v. *Frodsham* (15 Ch. D. 317) distinguished.—But *held* that the order was so irregular in form that the bank were justified in declining to act upon it, they being entitled to require a vesting order to be in such a form as to shew that the statutory requirements have been satisfied.—Statement of the recitals which ought to be contained in a vesting order made in Chambers under the Trustee Act. *In re* TWEEDY [C. A. 529

3. —— *Appointment of New Trustees—Separate Trustees of distinct Part of Trust Property—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.] Appointment made of new trustees to act in conjunction with a sole continuing trustee of a will in relation to a distinct part of the trust property. *In re* PAINE'S TRUSTS - - - 725

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VENDOR AND PURCHASER—*Conditions of Sale—Depreciatory Conditions—Sale by Trustees.*] Trustees for sale under a will put up for sale by auction certain lands in numerous small lots, with conditions providing (*inter alia*) that the title should commence with the conveyance to the testator ten years before; that every recital in any abstracted document should be conclusive evidence of the fact stated; and that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit-rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The sale was made also subject to certain general condi-

VENDOR AND PURCHASER—*continued.*

tions restricting the occupation of the land. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions; and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements or quit-rents affecting the property:—*Held*, that the condition as to existing tenancies and restrictive covenants was depreciatory, and that the objection was a good defence to an action for specific performance by the trustees against a purchaser.—But, *semble*, the condition limiting the title to ten years, having regard to the number and smallness of the lots, was not unreasonable. DUNN *v.* FLOOD [C. A. 586

2. —— *Conditions of Sale—Compensation—Misrepresentation—Rescission of Contract.*] The particulars of sale of a freehold property described the garden as "inclosed by a rustic wall with tradesmen's side entrance." The wall did not form part of the property, and the tradesmen's side entrance was used on sufferance. This was known to the vendor, but not disclosed to the purchaser. The conditions of sale provided that mistakes or errors in the description of particulars should not annul the sale, but that compensation should be given:—*Held*, that it was not a case for compensation, and that the purchaser was entitled to have the contract rescinded. BREWER *v.* BROWN - - - - - 309

3. —— *Conditions of Sale—Specific Performance—Objection to Conveyance—Vendor's Right to rescind.*] Trustees of a will put up land for sale, subject to a condition that, if any objection or requisition as to (*inter alia*) title, or abstract, or conveyance should be insisted on, and the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the sale. The abstract delivered to the purchaser shewed that the conveyance to the vendor's testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired and kept in repair" by the testator, his heirs, and assigns. This obligation was not mentioned in the particulars and conditions of sale, and the purchaser did not know of it until the delivery of the abstract. He accepted the title, and tendered to the vendors the draft of a conveyance to himself of the land with the wall, omitting all reference to the obligation to repair the wall. The vendors' solicitors added the words "subject to and with the liability for ever to repair the wall" by the purchaser, his heirs and assigns. The purchaser would not agree to the addition, and the vendors thereupon gave notice to rescind the contract. The purchaser then brought an action for specific performance of the contract, claiming the right to a conveyance without the additional words:—*Held*, that, if the obligation to repair the wall ran with the land, it was immaterial whether it was mentioned in the conveyance or not, because the purchaser would be bound by it in either case; but that, if it did not run with the land, the vendors, not having mentioned it in the particulars of sale, could not impose it on the purchaser. Consequently, the vendors were not entitled to rescind the contract. —*Semble*, that a condition of sale giving the vendor a right to rescind the contract, in the event of his being unable or unwilling to comply with a purchaser's requisition as to conveyance, is not in general a proper condition. HARDMAN *v.* CHILD [712

4. —— *Contract—Fraud—Misrepresentation.*] The Plaintiffs put up an hotel for sale on the 4th of August, 1882, stating in the particulars that it was let to "F. (a most desirable tenant), at a rental of £400 for an unexpired term of 27½ years." The L. Co. sent M. their secretary, to inspect the property. M. reported that F., from the business he was doing could hardly pay the rent, and that the town in which it was situate seemed to be in the last stage of decay. The directors on receiving this report, directed M. to bid up to £5000. M. went and bought for £4700. Before completion, F. went into liquidation, and the L. Co. refused to complete. The Plaintiffs sued for specific performance. It was proved that on the 1st of May, 1882, the Lady Day quarter's rent was wholly unpaid; that a distress was then threatened, and that F. paid £30 on the 6th of May, £40 on the 13th of June, and the remaining £30 shortly before the auction, and that no part of the quarter's rent due at Midsummer had been paid. The chairman of the company was orally examined, and deposed most positively, that the company would not have bought but for the representation in the particulars that F. was a most desirable tenant. Mr. Justice Denman held that there was a material misrepresentation, and that the contract had been entered into in reliance upon it. His Lordship accordingly dismissed the action, and on a counter-claim by the Defendants, rescinded the contract.—*Held*, on appeal, that the description of F. as a most desirable tenant, was not a mere expression of opinion, but contained an implied assertion that the vendors knew of no facts leading to the conclusion that he was not; that the circumstances relating to the Lady Day rent shewed that he was not a desirable tenant; and that there was a misrepresentation: *Held* also, that, as the positive testimony of the chairman, that but for this representation the company would not have bought, was not shaken on cross-examination, and was believed by the Judge who saw and heard the witness, the Court of Appeal would not disturb the finding that the representation had induced the company to enter into the contract, and that the appeal must be dismissed. SMITH *v.* LAND AND HOUSE PROPERTY CORPORATION - - - - C. A. 7

5. —— *Contract—Statute of Frauds, s.* 4—*Two Documents referring to same parol Contract of Sale—Sufficient Memorandum—Specific Performance.*] Two or more documents which do not refer to each other, but do refer to the same parol contract, and which, when taken together, contain all the terms of the parol contract, may together constitute a sufficient memorandum within the Statute of Frauds.—On the 22nd of September, 1882, the Defendant verbally agreed with the Plaintiff to sell him her share in certain property for £200, and signed and gave to him the following receipt: "Sept. 22nd, 1882. Received of J. Studds one pound of my share in the Barrett's Grove property the sum of two hundred

VENDOR AND PURCHASER—*continued.*
pounds." No time was fixed for completion, and no abstract was delivered, and on the 19th of March, 1883, the Defendant wrote to Plaintiff: "Mr. Studds,—Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd instant I shall consider the agreement (made 22nd of Sept., 1882) not any longer binding":—*Held*, that the word "balance" in the letter sufficiently referred to the receipt to enable the two documents to be read together, and that they constituted a sufficient memorandum within the Statute of Frauds, sect. 4: —*Held*, also, that even if the word "balance" was not sufficient to connect the two documents, yet that as they both referred to the same parol contract, all the terms of which were contained in one or other of them, they could be read together, and together constituted a good memorandum within the statute. Studds *v.* Watson - 305

6. —— *Practice—Payment into Court—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.] A mortgage deed gave the mortgagee an option to purchase in case the debt was not paid on a day named. The trustees in bankruptcy of the mortgagors sold the mortgaged property. A part of the purchase-money was deposited to provide against the mortgage. Pending proceedings on the part of the trustees to set aside the mortgage on the ground of fraudulent preference, an order was made that the money deposited should be paid into Court, and on such further sum being paid in as would cover the principal and interest due, and 10 per cent. extra, the mortgaged property should vest in the purchaser. Milford Haven Railway and Estate Company *v.* Mowatt. *In re* Lake & Taylor's Mortgage. Spain *v.* Mowatt - - 402

7. —— *Title—Expense of Abstract of Title—Deeds not in Vendor's Possession—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.] Under sect. 3, sub-sect. 6, of the Conveyancing Act, 1881, the purchaser on an open contract must bear the expense of procuring and making an abstract of any deed not in the vendor's possession of which he requires an abstract, even though that deed forms part of the forty years title which the vendor is bound to deduce, and he can compel its production. *In re* Johnson and Tustin - - - - 84

8. —— *Title—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-ss.* 4, 6 —*Peppercorn Rent—Evidence of Title.*] The Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 4, does not apply to a peppercorn rent so as by production of a receipt for a peppercorn to relieve the vendors of a building lease from the obligation of shewing that the covenants with their lessor (to finish the house within —— months to the satisfaction of the lessor's surveyor) have been duly performed and observed.—The certificate of the lessor's surveyor that the house has been finished to his satisfaction is not a certificate or "evidence" within sect. 3, subsect. 6, the expense of obtaining which must be borne by the purchaser, but a part of the title itself. *In re* Moody and Yates' Contract 661

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WATERWORKS COMPANY—*Injunction—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68 —*Jurisdiction.*] Although the statutory remedy provided by sect. 68 of the Waterworks Clauses Act, 1847, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, and the special remedy by penalties given by sect. 43 against a company for withholding water, have not ousted the general jurisdiction to restrain the company by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under sect. 68. Hayward *v.* East London Waterworks Company - - 138

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WILL—*Ademption—Legacy — Moral Obligation other than Parental.*] The doctrine of ademption of legacies founded on parental or *quasi*-parental relation applies also to cases where a moral obligation other than parental or *quasi*-parental is recognised in the will, though without reference to any special application of the money.—A testatrix by her will bequeathed to a niece of her deceased husband £500 with these words, "according to the wish of my late beloved husband," and she afterwards in her lifetime paid £300 to such legatee, with a contemporaneous entry in her diary that such payment was a "legacy from" the legatee's "uncle John":—*Held*, that the presumption was that such legacy was adeemed to the extent of £300, and that such presumption of ademption *pro tanto* only was not displaced by evidence that more than a year before the £300 was given the testatrix had said, that the legatee when then asked by the testatrix whether she would rather receive £300 down than a larger sum after the testatrix's death, had replied that she would prefer the £300 down. *In re* Pollock. Pollock *v.* Worrall - - C. A. 552

2. —— *Condition—Life Estate determinable on Bankruptcy—Gift over to Children — Time for ascertaining Class—Canons of Construction.*] A testator gave a fund to trustees upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally among all the children which the son might have, as and when they should respectively attain twenty-one; and if the son should leave no child who should attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that if the son should be adjudicated bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son "in the same manner

WILL—*continued.*

as if he was naturally dead" or in default of such child or children should sink into the residue. After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards:—*Held* (affirming the decision of Pearson, J.), that the children born after the adjudication were entitled to share in the fund subject to the contingency of their attaining twenty-one. — Observations upon the force of canons of construction. *In re* Bedson's Trusts [C. A. 523

3. —— *Mistake—Clerical Error in Description—Correction by Reference to Context—Manifest Absurdity or Incongruity.*] A clerical error may be corrected where, if uncorrected, it makes the will absurd, and the proper correction can be gathered from the context.—A testator devised an estate called Lea Knowl to trustees upon trusts for the benefit of his daughter W., her husband and children, and empowered his trustees, at the request of his daughter W., to sell the estate and stand possessed of the sale moneys upon the trusts thereinbefore declared "concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect." He then devised an estate called Croxton to trustees upon similar trusts for the benefit of his daughter C., her husband and children, and empowered his trustees, at the request of his daughter C., to sell the last-mentioned devised hereditaments and stand possessed of the sale moneys, "in trust for such person and persons, and for such estates, ends, intents and purposes, powers, provisoes, and conditions as are hereinbefore limited, expressed, and declared, of and concerning the said Lea Knowl estate hereby devised, as to such and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect":—*Held*, that the words, "the said Lea Knowl estate," in the trusts of the moneys to arise from the sale of the Croxton estate had been inserted in the will through an obvious error: that to read the words, "the said Lea Knowl estate," literally and grammatically, would be making the will lead to a manifest absurdity or incongruity, and that the will must be read as if the words, "the said Croxton estate," were inserted in the place of the words, "the said Lea Knowl estate," in the trusts of the moneys to arise from the sale of the Croxton estate. *In re* Northen's Estate. Salt *v.* Pym - - - - - - 153

4. —— *Ordinary Outgoings—Tenant for Life—Apportionment — Metropolis Local Management Act*, 1885 (18 & 19 *Vict. c.* 120), *s.* 73—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 96, 97.] A testator gave freehold and leasehold houses, bonds, and consols on trust to pay the income after deducting ordinary outgoings to his widow for life:—*Held*, that the tenant for life must bear the cost of drainage work required to be done to one of the leasehold houses by the vestry under the Metropolis Local Management Act, 1855, s. 73. *In re* Crawley. Acton *v.* Crawley - - - - - - 431

5. —— "*Real estates wheresoever situate*"—*Personal Estate—Leasehold for Years—Wills Act* (1 *Vict. c.* 26), *s.* 26.] A testator by his will, dated in 1870, declared that his trustees should stand possessed of and interested in the annual income and proceeds of his real and personal estate in trust to pay an annuity to his wife, and after her decease he declared and directed that his trustees should stand possessed of and interested in his real and personal estate upon the trusts and for the intents and purpose following, that is to say, "as to my real estates wheresoever situate (the Victoria Park Cemetery in the parish of St. Matthew, Bethnal Green, excepted)" in trust to pay the annual rents and proceeds thereof to two children as therein mentioned, "and as to my freehold estate called the Victoria Park Cemetery, and my personal estate wheresoever situated, upon trust to pay the dividends, interest and annual proceeds thereof," to his five daughters in equal proportions.—The personal estate comprised certain leaseholds for years.—*Held*, that according to the true construction of the 26th section of the Wills Act (1 Vict. c. 26) the leaseholds for years did not pass under the gift of the real estates.—*Wilson* v. *Eden* (11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153) discussed; *Turner* v. *Turner* (21 L. J. (Ch.) 843) and *Gully* v. *Davis* (Law Rep. 10 Eq. 562) discussed and distinguished. Butler *v.* Butler - 66

6. —— *Remoteness—Divisible Gift—Gift to Children of A. who should attain Twenty-one—Period for ascertaining Class—Prior Trust for Accumulation of Income.*] Devise of real estate to trustees in fee, upon trust for J. for life, and after his death upon trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age; but, in case there should be no child, nor the issue of any child of J. who should attain twenty-one, the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, if more than one in equal shares. Provided always, that the rents of the trust premises should, during the term of twenty years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one. J. died without ever having a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation:—*Held*, that the gift over to the children of R. was divisible into two distinct alternative gifts, viz., (1) a gift over in the event of there never being any child of J.; (2) a gift over in the event of no child or issue of any child of J. attaining twenty-one; and that consequently the first alternative was not too remote, and the gift over was in the events which had happened good.—*Evers* v. *Challis* (7 H. L. C. 531) explained.—*Stuart* v. *Cockerell* (Law Rep. 5 Ch. 713) distinguished.—*Held*, also, that all the children of R. who were born during the period of accumulation, and who attained twenty-one, were entitled under the gift over. Watson *v.* Young - - - - 436

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